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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1996

MAX A. DUNLAP
Petitioner,

vs.

STATE OF ARIZONA
Respondent.

On Petition for Writ of Certiorari
to the Court of Appeals of Arizona

PETITION FOR WRIT OF CERTIORARI

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April 14th, 1997.

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QUESTIONS PRESENTED

I.

WHETHER IN THE CASE OF SUCCESSIVE PROSECUTIONS OF THE SAME DEFENDANT THE RIGHT TO A SPEEDY TRIAL SHOULD ATTACH FROM THE DATE THE INITIAL FORMAL CHARGE WAS PLACED?

II.

WHETHER PETITIONER WAS DENIED DUE PROCESS, REQUIRING DISMISSAL OF THE MURDER CHARGE, BY THE DECADE-LONG HIATUS IN THE PROSECUTION DUE TO THE STATE'S VACILLATION ON WHETHER TO SUBJECT ITS COOPERATING WITNESS TO TRIAL?

III.

WHETHER THE LOWER COURT CORRECTLY APPLIED THE STANDARD CONCERNING HARMLESS ERROR ONCE THE COURT DECIDED THAT PETITIONER WAS DENIED HIS RIGHT TO CONFRONT THE STATE'S KEY WITNESS?

IV.

WHETHER THE ADMISSION OF THE GRAND JURY TESTIMONY OF A WITNESS, WHO SAID HE WAS OLD AND COULD NOT REMEMBER WELL, ABSENT ANY CROSS-EXAMINATION, VIOLATES THE CONFRONTATION CLAUSE?

IV.

WHETHER THE LOWER COURT SHOULD HAVE CONSIDERED THE CUMULATIVE EFFECT OF ITS FINDING OF MULTIPLE FEDERAL CONSTITUTIONAL ERRORS BEFORE FINDING EACH INDIVIDUAL ERROR HARMLESS?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Max A. Dunlap, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Arizona entered on September 5, 1996 which became final on January 14, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals of Arizona which refers to the unpublished order of the Supreme Court of Arizona denying the petition for review on January 14, 1997 is reported at 930 P.2d 518 (Ariz. App. Div. 1 1996) and is included in the Appendix (A 4-83). A previous opinion of the Arizona Supreme Court reversing petitioner's conviction and death sentence is reported at 608 P.2d 41 (Ariz. 1980) and is included in the Appendix (A 98-108), as is the decision of the United States District Court affirmed by the United States Court of Appeals for the Ninth Circuit denying Dunlap's related 42 U.S.C. §1983 claim. *Dunlap v. Corbin*,532 F.Supp. 183 (D. Ariz. 1981), *aff'd without opinion,* 673 F.2d 1337(9th Cir. 1982) (A 84-97).

JURISDICTION

The Opinion of the Court of Appeals of Arizona was entered on September 5, 1996. The Order of the Supreme Court of

Arizona denying review was entered on January 14, 1997. The jurisdiction of this Court to review the Opinion of the Court of Appeals of Arizona is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth and Fourteenth Amendments to the United States Constitution (A 1).

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Max Dunlap, a successful business and family man, never before convicted of a crime, was convicted of the car bomb murder of Arizona Republic reporter Don Bolles and sent to Arizona's death row in 1977, along with codefendant James Robison, based exclusively on the testimony of the admitted murderer, who was then himself spared and given a mere 20-year sentence. The Arizona Supreme Court ordered a new trial in 1980 due to improper restriction of the cross-examination of John Adamson, the bomber. *State v Dunlap*, 608 P.2d 41 (Ariz. 1980). Robison's conviction was likewise reversed. *State v. Robison*, 608 P.2d 44 (Ariz. 1980).

Dunlap then demanded an expedited trial. Adamson, recognizing an opportunity, presented the prosecution a list of new demands (including various fringe benefits) in an effort to sweeten his already generous deal: in sum, he wanted to "walk" if he testified again. This time, instead of caving in to Adamson's demands, the state prosecuted him, and with little difficulty secured a conviction and death sentence. Although Adamson insisted that he had only been bluffing and was ready to testify for the state against Dunlap and Robison, the state both rejected his offer and determined that prior transcripts of Adamson's testimony were inadequate for use at a retrial. Instead, over objection, the state secured a dismissal without prejudice of the murder charge against Dunlap. He was released from custody in 1980 and returned to his family and former life. Because the "dismissed" murder was still hanging over him, however, he sued the state, without success, to force a trial. Then he discovered that the police department had "purged" critical intelligence files relevant to his defense (so his lawyers wouldn't obtain them) and sued again.

Adamson spent the next decade struggling by every means available to stay out of the gas chamber. In the end, he appeared to gain an advantage, as the federal courts ordered a resentencing. Max Dunlap remained a free, law-abiding family man until December of 1990. At that time, a new set of prosecutors changed direction, reinstated Adamson's deal and re-charged Dunlap with the Bolles murder, as well as a new charge of conspiracy to commit obstruction of a criminal prosecution/influencing a witness. The new conspiracy charge was the modest outcome of an intensive re-investigation that saw the state monitor Dunlap's private conversations, repeatedly search his home, and seize all of his papers--but that produced no new evidence beyond a suggestion that Dunlap did small favors for his co-defendant James Robison. Despite (or perhaps because of) its failure to generate any substantial new proof of Dunlap's involvement in the Bolles murder, the new prosecution team elected to revive its prosecution of Dunlap by an agreement that has already resulted in Adamson's freedom. In short, the state has freed the admitted murderer--not merely from death row, but back into society-- in order to reprosecute the citizen he fingered, despite a lack of substantial corroboration.

Max Dunlap's retrial began in 1993--nearly 17 years after the murder of Don Bolles. The trial record reveals, not surprisingly, that critical witnesses had died during that 17-year hiatus, and the memories of the surviving witnesses had dimmed. As it did in 1977, the state's case at retrial turned on the credibility of the actual murderer, John Adamson. Struggling with that testimony, the deliberating jury twice announced it was deadlocked. Finally, however, on April 20, 1993, after seven days of deliberation, Dunlap was convicted on both charges. Later the same year, in a case tried before the same judge, prosecuted by the same prosecutor and--save for one critical ruling--submitted on the same evidence,[1] a second jury acquitted the codefendant Robison. On January 7, 1994, Max Dunlap, now the only loser in this 17-year-prosecutorial lottery, was sentenced to life in prison for murder, and to two years for obstruction/bribery.

II. STATEMENT OF FACTS

A. PROSECUTION EVIDENCE: The state's theory, based on John Adamson's version of events, was that Don Bolles was targeted for a revenge hit by Kemper Marley, a prominent businessman and recently-resigned member of the Racing Commission, because Bolles had written articles critical of Marley. Adamson claimed that the Bolles murder was part of a larger plot to commit similar revenge assassinations of gadfly critic King Alphonse and then-Attorney General Bruce Babbitt. As Adamson explained it, Max Dunlap was a protégé of Marley who hired Adamson to murder Bolles because Adamson was a career criminal with expertise in explosives. Adamson testified that he enlisted Jimmy Robison to assist with the murder, built a bomb, lured Bolles to the parking lot of the Clarendon Hotel, and placed the bomb under Bolles' car. Robison detonated it when Bolles returned to the car. Unfortunately for Adamson, Bolles was able to utter the words "Adamson" and "Emprise" at the bombing scene. Besides Adamson, the state's case relied on the fact that eight days after the bombing, Max Dunlap gave Adamson about $6,000 at the law office of Tom Foster.

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[1] The key difference at Robison's trial was that the judge both admitted into evidence and permitted defense cross-examination of Adamson concerning his so-called "Zobel letter". (2/1/94, 16-17). The letter revealed that Adamson had hatched a cash-for-testimony scheme a few months after he murdered Don Bolles. At Dunlap's retrial, by contrast, the jury was permitted to hear about only the parts of the Zobel letter that the prosecutor wished to use, and never learned of Adamson's plans to alter his testimony in exchange for cash payments, to be laundered through investigator Zobel.

The key witnesses at trial were Adamson and his various cohorts. Adamson admitted he was a thief, burglar, arsonist, heavy drinker and murderer. (Transcript of Evidence, hereinafter TE 2/23/93, 27, 31). In 1974 Adamson met Dunlap through attorney Neal Roberts. (TE 2/23/93,43-44). Adamson claimed he and Dunlap "conducted business" together by 1975, (TE 2/23/93, 44), and he was allowed to use Dunlap's credit card. He said he always met with him alone. (TE 2/23/93, 44, 48). Adamson was told by Dunlap to identify himself only as "Mr. Smith" when he called Dunlap's home. (TE 2/23/93, 58).

Adamson testified that in March 1976, he met with Dunlap and others at Roberts' office. After the initial meeting Dunlap supposedly asked him how much it would cost to have Bruce Babbitt and King Alphonse killed. (TE 2/23/93, 79-81). About two weeks later Adamson claimed that Dunlap added Bolles to the list. (TE 2/23/93, 82). Adamson set a price of $50,000, asked for $5,000 up front, and got $2,000. (TE 2/23/93, 84-85). Adamson explained that the Bolles killing was urgent because of Kemper Marley's appointment to the Racing Commission. (TE 2/23/93, 86).

Adamson testified he asked Robison to help since they'd done "serious stuff" together. (TE 2/23/93, 89-90). They had blown up Tops Tavern as an insurance scam; Robison built the timing device and Adamson said he did the explosives. (TE 2/23/93, 99-101). When he told Neal Roberts about the incident, Roberts asked them to blow up the BIA building as an insurance scam. (TE 2/23/93, 104-105). Again, Adamson said he took care of the powder and Robison did the timing, but someone found the bomb before it exploded. (TE 2/23/93, 108-110).

Adamson said he saw Dunlap at Roberts' office, purely by chance, on June

2, 1976. He told him to "send Mr. Smith to the bank" because it will be over at 11:30. (TE 2/23/93, 126-127). "Mr. Smith" was supposedly a code name for himself, Dunlap and Marley. (TE 2/23/93, 127). Adamson claimed that he told Dunlap he was meeting Bolles at the Clarendon at 11:30 and it would be over then. (TE 2/23/93, 181).

That day Adamson took a bomb to the Clarendon parking lot, placed it under Bolles' Datsun, and left. (TE 2/24/93, 18-19). Adamson claimed Robison was there with a radio control device and was to detonate it. (TE 2/24/93, 20-21). About 11:30 a.m. Adamson claimed Robison called, telling Adamson to send Mr. Smith to the bank, that it was done "eyeball to eyeball". (TE 2/24/93, 31).

Adamson said that Dunlap showed up at the Ivanhoe about 2:00 p.m.(TE 2/24/93, 34-35). According to Adamson, Dunlap said Adamson's name had been "mentioned" and wanted to know whether to leave the money with Tom Foster or with Robison. (TE 2/24/93, 36). This surprised Adamson who says he did not think Dunlap knew about Robison. (TE 2/24/93, 36). A few days after the bombing, Adamson claimed Roberts said at the Ivanhoe in a loud voice that Adamson should call Dunlap and make him honor his commitment. (TE 2/24/93, 55). When told this, Dunlap suggested blaming Roberts if he had to blame anyone. Adamson testified that Dunlap offered to send his wife Mary Adamson and their child $400-$800 per month. (TE 2/24/93, 56-58).

Adamson related that Dunlap brought him almost $6000.00 at lawyer Foster's office suite and they met for 15-20 minutes. (TE 2/24/93, 68-69). Patti Lloyd, Foster's secretary, was also there. (TE 2/24/93, 69). Adamson believed he was being followed by police or reporters. (TE 2/24/93, 63).

Adamson described his original deal -- 20 years and 2 months in prison to serve outside Arizona -- for the Bolles murder and other crimes. (TE 2/24/93, 90-92). Over defense objection, Adamson was allowed to describe Dunlap's 1977 conviction and death sentence, the appeal and reversal, and Adamson's attempt to negotiate a new deal. (TE 2/24/93, 94-100). However, he testified that during the period 1980-1989 he communicated to the Attorney General that he was willing to testify again in return for the original deal. (TE 2/24/93, 101).

Adamson refused to concede, despite prosecution testimony, any involvement of Neal Roberts. He denied that Roberts stated: "I want it loud and clear", referring to bombing Bolles, as his friend Hank Landry testified. (TE 2/24/93, 128). He also contradicted Landry on whether Adamson told Landry on June 2, 1976 that the bombing would take place that day. (TE 2/24/93, 168).

The defense attacked Adamson as manipulative and his testimony as well-rehearsed and staged. The prosecutors presented him as rehabilitated and as misunderstood by previous prosecution teams. Adamson admitted reading important police reports, as well as interviews with Dunlap and Bolles, before making his proffer. (TE 2/24/93, 157-159).

Adamson acknowledged that investigator John Zobel worked on his case. (TE 2/24/93, 93-94). In a crucial ruling, the court would not permit impeachment of Adamson with his letter to Mary Adamson where he discusses a cash-for-testimony scheme involving diversion to Mary of money ostensibly paid to Zobel by defendants in the Bolles case. The letter revealed Adamson's willingness not to be a "good witness" if the price were right, and his belief that such alterations in his testimony could be lucrative. (TE 3/1/93, 61-65). Even though the prosecutor asked Adamson about the letter on redirect, no recross on the subject was allowed, (TE 3/2/93, 45-46, 94), and the critical portions of the letter that showed Adamson's willingness to sell his testimony were never revealed to the jury. The trial judge would later reverse his ruling during Robison's trial, and Robison would be acquitted.

Hank Landry, who by the time of the retrial had changed his name to Henry Miller, described how he and Adamson burned buildings, stole, and drank heavily. (TE 2/18/93, 62). Landry related Roberts' important "loud and clear" remark at the Memorial Day outing. (TE 2/18/93, 94-95, 105). He claimed that on June 2, 1976, he was at Roberts' office and overheard Dunlap ask Roberts if Adamson knew what he was doing, to which Roberts supposedly said it wasn't Adamson's fault that the BIA building didn't blow up. (TE 2/18/93, 77-78).

Landry admitted having denied any knowledge of the Bolles bombing when questioned in 1976. (TE 2/18/93, 93). Only when he was arrested in 1978 for conspiracy to commit armed robbery did he start providing information. (TE 2/18/93, 96). Landry testified he has no conscience and had tried to sell his story to the highest bidder. (TE 2/18/93, 107, 176, 179-180).

Jon Sellers, who like many police officers in this case was now retired, described a secretly-taped interview with Dunlap on June 16, 1976. (TE 3/3/93, 74, 75). Dunlap was cooperative but nervous and used the phrase "eyeball to eyeball". (TE 3/3/93, 86-87). On June 24, 1976 Dunlap told Sellers he gave money to Adamson. (TE 3/3/93, 90-91). Dunlap said he got it from a stranger who explained

Neal Roberts wanted him to do a favor. (TE 3/3/93, 90-92).

B. DEFENSE EVIDENCE: The passage of time and the commensurate need to rely on hearsay made the evidence hard to elicit and harder to understand. However, the facts that did emerge at trial support other explanations for Don Bolles' murder far more plausible than the prosecution's theory that Kemper Marley induced Max Dunlap to hire Adamson to kill Bolles, Babbitt and Alphonse because Marley was angry at those individuals for an assortment of reasons. First, there is Emprise Corporation, its organized crime connections, (TE 3/29/93 pm, 67), which Adamson shared, (TE 3/25/93, 46), and an individual connected with Emprise, Bradley Funk.

Bolles himself suspected Emprise immediately. (TE 3/8/93, 44-45). He had written a nationally-disseminated story about Emprise and its relationship with organized crime. (TE 3/29/93 pm, 61). He was still investigating Emprise at the time of his death. (TE 3/29/93 pm, 66). Sam Steiger explained that the Funk family had introduced greyhound racing in Arizona, but due to a failure of a track had to borrow funds from Emprise and came under their control. (TE 3/29/93 pm, 62). Bolles had gone so far as to testify before Congress and was very critical of Emprise and the Funks. (TE 3/29/93 pm, 63). Emprise and the Funks sued both Congressman Steiger and Bolles. (TE 3/29/93 pm, 66). Bolles and Steiger had an ongoing relationship, and he spoke with Bolles 3-6 weeks before he was killed. (TE 3/29/93 pm, 66). After the bombing Steiger told the police they should look at the Funks. (TE 3/29/93 pm, 70).

Bradley Funk and Adamson had been in Neal Roberts' office together shortly before the bombing. (TE 3/4/93, 4-6, 9; 3/8/93, 96). The day of the bombing, Funk's father, whom Bradley Funk had not seen in three years, appeared in Phoenix and took him to an alcohol rehab facility in California. (TE 3/4/93, 34-35). At that facility Funk confided to William Wright (who, like Funk, was deceased by the time of the retrial) that he and Adamson were drinking buddies. (TE 3/4/93, 33).[2] Funk also stated that he would be blamed for the Bolles' murder, and took Wright to a hobby shop to show him a remote control device. (TE 3/4/93, 35). Finally, Wright advised that Funk had an appointment with his attorney, Neal Roberts, in San Diego, on July 4, 1976. (TE 3/4/93, 36-37).

Funk's ex-wife, Betty Funk Richardson, was in touch with Don Bolles. She told the police that Bradley expressed vengeful feelings toward Bolles. (TE 3/8/93, 119-120). The police also had information that the Funks were trying to arrange Adamson's murder after Bolles named Emprise. (TE 3/8/93, 59-61). Significantly, when questioned on the day of the bombing, Mary Adamson stated that when her husband had left for work that morning he was working for Emprise. (TE 3/22/93, 11).

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[2] This would have been confirmed by the missing, so-called "drunk Funk" police report (TE 3/22/93, 38; 3/23/93, 35-38), which connects Adamson and Funk.

An important part of the defense focus was Neal Roberts, whose role so concerned the state that in closing argument the jury was invited to talk privately later with the Attorney General's staff about why Roberts wasn't prosecuted (TE 4/5/93, 51). Roberts' secretary told the police that Roberts called Bolles an SOB, and said he hoped Bolles died. (TE 3/8/93, 63). Roberts' friend, Hank Landry testified that when he asked Adamson and Roberts at a Memorial Day party why Bolles shouldn't just be shot with a gun, Adamson said, "My people want dynamite" and Roberts said "I want it loud and clear". (TE 3/8/93, 66-67).[3] Roberts called Lake Havasu *before the bombing,* (TE 3/25/93, 83; 3/24/93, 92), on

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[3] At trial the state tried to twist the statement to "*we* want it loud and clear". (TE 2/18/93, 94-95). Incredibly, Det. Sellers didn't know if he ever bothered to ask Neal Roberts about the statement. (TE 3/8/93, 67-68).

June 2, 1976, a total of six times that day, (TE 3/30/93, 62), planning and arranging Adamson's getaway. (TE 3/18/93, 70). He arranged for Adamson to be flown to Lake Havasu the night of the bombing, (TE 2/24/93 43-45), and lodged in Roberts' suite. (TE 3/24/93, 91). He contacted an attorney for Adamson, and tried to raise money for attorney's fees. (TE 2/24/93, 43). Adamson told his wife that if she needed money she could get it from Ned Warren or Roberts. (TE 3/30/93, 68). Roberts originated the Marley/Dunlap theory on June 15, 1976 to obtain immunity for himself. (TE 3/4/93, 140-141).

The lynchpin to the defense theory centering on Roberts which both explains Roberts' motive and corroborates other defense evidence was police informant Robert Sprouse, a man unknown to Max Dunlap. Roberts admitted to Sprouse that he framed Dunlap. The jury, however, never heard this evidence because the charges against Dunlap were not revived until after Sprouse had died.

STAGE WHERE FEDERAL QUESTIONS RAISED
See Appendix (A 2-3)

REASONS FOR GRANTING THE WRIT

A. THE LOWER COURT DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW FALLING BETWEEN TWO LINES OF

CASES THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Dunlap urged the lower court to hold that in cases of successive prosecutions of the same defendant the speedy trial right should attach from the date when the initial formal charge was brought. That court declined to do so and employed a pure pre-indictment delay/due process analysis. 930 P.2d at 526-528.

This is a case that falls outside the dictates of *Klopfer v. North* Carolina, 386 U.S. 213 (1967), *United States v. Lovasco,* 431 U.S. 783 (1977), *United States v. MacDonald,* 456 U.S. 1 (1982), and *Doggett v. United States,* 505 U.S. 647 (1992). In *Klopfer,* the prosecutor, over objection of the defendant, entered a "nolle prosequi" following a mistrial caused by a hung jury, and the defendant was discharged from custody. 386 U.S. at 217. This Court found Klopfer was denied his right to a speedy trial by this procedure since the case could be redocketed at a future date. 386 U.S. at 221-222. *Lovasco* involved an eighteen month delay between the offenses and the indictment; this Court held the due process clause governed the decision concerning whether the indictment should have been dismissed, and the reasons for the delay as well as prejudice to the accused had to be considered. 431 U.S. at 790, 795.

In *MacDonald* this Court considered whether the right to a speedy trial applied when there was a four year delay between dismissal of military murder charges and institution of civilian murder charges. 456 U.S. at 4-6. The Court held that the speedy trial clause did not apply to the period "after the Government, acting in good faith, formally drops charges." 456 U.S. at 7. Finally, in *Doggett* this Court held an 8 ½ year delay between Doggett's indictment and his arrest violated his right to a speedy trial. 505 U.S. at 656-658. The Court reached this conclusion even though it found government negligence responsible for the delay and Doggett could demonstrate no specific prejudice. 505 U.S. at 652-656.

None of this Court's relevant speedy trial/pre-indictment delay cases address the issue raised by this case -- whether the right to a speedy trial should attach at the time of initial formal charge when the defendant is prosecuted and then thereafter the charge is dismissed over his objection. Isn't this case really more analogous to *Klopfer* than to *MacDonald?* Isn't the fact that the charge was "nolle prosequi" in *Klopfer* while it was formally dismissed in this case a distinction without a constitutional difference?

In *MacDonald* three dissenting Justices analyzed *Klopfer* and *United States v. Marion*, 404 U.S. 307 (1971) and stated that in the case of successive prosecutions on the same charge "the speedy trial right should attach from the date of the initial accusation, a date which is simple to determine." 456 U.S. at 17. Those Justices noted that the impediment to which *Marion* alluded with regard to extending the speedy trial right prior to a first charge -- a difficult inquiry into when charges first could have been brought by police or prosecutors -- did not exist in cases of successive prosecutions of the same defendant on the same charge. *Id.* Their reasoning concerning this issue:

> The majority's insistence that the dismissal of an indictment eliminates speedy trial protections is not only inconsistent with the language and policies of the Speedy Trial Clause and with this Court's decisions. It is also senseless. Any legitimate government reason for delay during the period between prosecutions can, indeed must, be weighed when a court determines whether the defendant's speedy trial right has been violated. No purpose is served by simply ignoring

> that period for speedy trial purposes.

MacDonald, 456 U.S. at 19.

That is particularly so when the initial charge resulted in a trial by jury and a verdict. A writ of certiorari should be granted.

B. THE LOWER COURT DECIDED IMPORTANT FEDERAL QUESTIONS IN WAYS THAT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

1. DELAY IN PROSECUTION

Utilizing a *Lovasco* due process analysis, the lower court rejected Dunlap's claim that the indictment should have been dismissed. It held that Dunlap was required to show "(1) the delay was intended to gain a tactical advantage or to harass him, and (2) the delay actually and substantially prejudiced him." 930 P.2d at 527. The first prong cited by that court is more stringent than this Court has required. This Court has recognized that intentional delay by the government to gain a tactical advantage over the accused would violate due process. *Lovasco*, 431 U.s. at 795. However, it also approved the government's concession in *Marion* that a due process violation:

> ... might also be made out upon a showing of prosecutorial delay incurred in a reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.

431 U.S. at 795, n. 17.

In this case the alleged reason for the delay was Adamson's recalcitrance about testifying at the 1980 retrial. However, the state conceded at trial that as soon as the Arizona Supreme Court found that Adamson had violated the terms of his plea agreement and the murder charge was reinstated against him, *Adamson v. Superior Court of Arizona*, 125 Ariz. 579, 611 2d 932 (1980), Adamson was willing to testify against Dunlap according to the terms of the original plea agreement. (SR 364-365). Nonetheless, the Arizona Court of Appeals found the state had the right to prosecute Adamson and "[t]his prosecution occasioned an extended appellate process." 930 P.2d at 527. The court acknowledged the state's actions in that process may have been "unfair in some sense" to Dunlap but found no intentional delay to gain tactical advantage. Dunlap asserts that, at a minimum, he demonstrated "a reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay could impair the ability to mount an effective defense." *Lovasco*, 431 U.S. at 795, n. 17.

With respect to prejudice, the Arizona appellate court found Dunlap failed to make an adequate showing. 930 P.2d at 528. Dunlap urges that the death of Robert Sprouse is sufficient in and of itself to show prejudice. Neal Roberts allegedly told Sprouse the following:

1) Roberts had set up the murder of Don Bolles (SR 399-400).

2) Roberts said that he was the one who ordered the bombing and set it up for his gambling friends to whom he owed money. (SR 400, 405).

3) Adamson dreamed of being a hood and Roberts gave him that opportunity. (SR 404).

4) Because Roberts owed the gambling people so much money, he called Adamson's cocaine and gambling bills due and told Adamson that if he did not help with the murder he and his family would be killed. (SR 405-406).

5) Adamson was supposed to do the whole job himself, but

was real sloppy and could not be trusted. (SR 401).

6) The Funks decided to bring someone in from Chicago to help Adamson. (SR 401).

7) Adamson ultimately was used for a patsy on the whole thing and the person from Chicago hired by the Funks was responsible for placing and detonating the bomb. (SR 400-401, 406).

On October 12, 1989, Special Agent George Weisz of the Attorney General's Office contacted the State of Missouri where Sprouse had been serving a life sentence for murder. Weisz was informed that Sprouse had committed suicide on December 27, 1988, by overdosing on a drug with which he was being treated for depression.

The death of Robert Sprouse deprived Dunlap of a vital witness capable of unmasking the hoax being perpetrated by Adamson. Sprouse's testimony would have exposed Adamson as a liar, and would have confirmed law enforcement's early suspicions of Neal Roberts as the person responsible for ordering Bolles' death. The unavailability of Sprouse severely impaired Dunlap's efforts to exonerate himself and establish Neal Roberts as the party responsible for the Bolles murder.

The lower court found that "whether Sprouse's testimony as to what others told him would be admissible under the rules of evidence is unclear." 930 P.2d at 528. Certainly Sprouse could have testified to prior inconsistent statements by Roberts if Roberts had disavowed what he told Sprouse. ARE 613. The lower court also found "no reasonable basis to assume the jury's verdicts would have been different with his testimony." 930 P.2d at 528. But there clearly is such a basis where the case is weak and the jury hung twice and deliberated more than seven days. Certiorari should be granted.

2. DENIAL OF CONFRONTATION OF ADAMSON

The Court of Appeals of Arizona held that the trial court's rulings concerning the Zobel letter violated Dunlap's right of confrontation. 930 P.2d at 532-533. However, that court found the error to be harmless. *Id.* at 533-534. In doing so that Court did not use the correct analysis for determining whether the error was harmless. The court should have employed the harmless error analysis of *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), a case involving harmless error in the context of denial of confrontation. In that case this Court instructed that factors to be considered in deciding whether denial of confrontation is harmless include the following:

> [t]he importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id. at 684.

Applying the *VanArsdall* analysis to the trial court's decision regarding the Zobel letter, it is clear that the denial of confrontation of Adamson was not harmless. Adamson's testimony was absolutely critical to the prosecution's case and was not cumulative. That testimony was corroborated on some points and contradicted on others. While cross-examination of the witness was lengthy, it was generally ineffective because Adamson was so slippery.[4] And the prosecution's case was weak as evidenced by the jury's deliberating for more than seven days and twice announcing they were deadlocked. Most critically, the trial judge did admit into evidence and permit defense cross-examination of Adamson about the "Zobel letter" at James Robison's trial (A 3-18), and Robison was acquitted (2/1/94, 16-17; A 55-56). How could this error possibly be harmless *beyond a reasonable doubt*?

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[4] Every time he was impeached he had a ready explanation: "true but incorrect", (TE 2/24/93, 143), "don't recall", (TE 2/24/93, 150), "inaccurate". (TE 2/24/93, 166-167). He feigned lack of understanding of common expressions (such as "snow job"), (TE 2/25/93, 7-8), disassociated himself from the demand letter he sent after Dunlap's conviction was reversed (he was "taken aback by the tone" of the letter), (TE 2/24/93, 63,64), and assured the jury that he was telling the truth and risked being sentenced to death again if he

3. DENIAL OF CONFRONTATION OF HAROLD BONE

Over Dunlap's vigorous objection the trial court admitted the grand jury testimony of Harold Bone, deceased at the time of trial (R 78-79; TE 3/15/93, 12). Dunlap asserts that the trial court's decision, upheld by the Arizona Court of Appeals, conflicts with *Idaho v. Wright*, 497 U.S. 805 (1990).

At the time Mr. Bone testified he was 79 years old, with an admittedly failing memory, and was attempting to recall a conversation that had occurred 14 years earlier. (R 79a). Moreover, he had testified as a character witness at the first trial and did not recount such a statement by Dunlap. (R 79a). His Grand Jury testimony lacked *any* circumstantial guarantees of trustworthiness. Moreover,

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lied. (TE 2/24/93, 100).

its admission at trial denied Dunlap his right of confrontation.

Bone's grand jury testimony was prejudicial to Dunlap. He acknowledged knowing Max since 1955, and raised funds for his defense. (TE 3/15/93, 13). Bone described a conversation with Max during the summer of 1976 at about 11:00 p.m. when Max came to visit Bone's son in a hospital burn unit. (TE 3/15/93, 23-24). Max supposedly told him a man came to his home and gave him $5,000 to take to Neal Roberts; Max went to the bank the next day, changed the money into small bills and took it to Roberts' office where Adamson was present. (TE 3/15/93, 24-25). This account of events contradicted Max's statement to the police in several respects, a fact duly noted in closing argument. (TE 4/5/93, 67-68).

Cross-examination would likely have revealed that Bone had simply jumbled his facts. Defense counsel would surely have asked the elderly witness if the passage of time had affected his memory, whether he was distraught when he had this conversation at 11:00 p.m. in the burn unit where his son was a patient, whether he may have been mistaken about the details of the conversation, whether media stories might have skewed his memory, etc. But the jury did not have the benefit of that cross-examination, or any cross at all.

The Court of Appeals did cite *Idaho v. Wright* and found the testimony "contained adequate guarantees of trustworthiness to satisfy the requirements of Rule 804(b)(5) and the confrontation clause" because Bone was under oath, testifying to matters in his personal knowledge, did not recant and had no motive to harm Dunlap. 930 P.2d at 536-537. The Court stated 'we concede the lack of evidence corroborating Bone's testimony weighs against its admissibility." 930 P.2d at 537. The Court then concluded that, even if the trial court erred in admitting the testimony, any error was harmless because Bone's testimony "may have bolstered defendant's theory of a stranger handing him money to deliver." *Id.* Dunlap contends that such reasoning defies common sense. The prosecutor would not have risked reversible error and emphasized Bone's testimony as evidence of Dunlap's guilt in closing argument if that testimony may have been helpful to Dunlap. In the context of this trial with other serious errors acknowledged by the lower court, the admission of Bone's testimony could never have been harmless. Review should be granted.

C. THIS COURT SHOULD ADDRESS THE IMPACT ON A FINDING OF HARMLESS CONSTITUTIONAL ERROR OF MULTIPLE OTHER CONSTITUTIONAL ERRORS.

In Section B.2. Dunlap addressed the lower court's finding that the denial of confrontation of Adamson with the Zobel letter was harmless error. In Section B.3. he addressed that court's finding that any denial of confrontation of deceased witness Harold Bone was harmless error. Dunlap asserts that these constitutional errors cannot be viewed in isolation. To determine whether they could truly be harmless one must consider the other significant errors at this trial.

The lower court also found error in the trial court's admission of Rosalie Bolles' alleged hearsay statement shortly before trial to a state investigator that her husband was investigating Kemper Marley at the time of his death. 930 P.2d at 534-535. Mrs. Bolles did not testify. However, the court found "the evidence did not affect the verdict" and was "cumulative." That court cited alleged testimony to which Ms. Bolles' testimony would have been cumulative. 930 P.2d at 535. There was no such testimony and the court's "facts" were no doubt lifted from the Attorney General's Brief which Dunlap moved to strike because of numerous misrepresentations of the record. *Id.* Addressing the question of admission of entries in the non-testifying Robison's prison diaries, the court held the trial court did not exercise its discretion "in a manifestly unreasonable manner, or on untenable grounds" because Robison may have used the entries to help him carry out a conspiracy with Dunlap. *Id.* at 535-536.

Regarding the admission of the 1990 grand jury testimony of the deceased Harold Bone, age 79, who admitted his memory was poor, about a conversation with Dunlap 14 years earlier, the court conceded there was a lack of evidence corroborating Bone's testimony but concluded that, even if its admission was error, the error was harmless. *Id.* at 536-537. The court then addressed the impeachment of defense witness Foglesong, the only person who could corroborate Dunlap's account of a stranger approaching him with money in a paper bag, with a 13 year old conviction and found that the trial court erred in determining the conviction was admissible. *Id.* at 537-538. Once again, however, the court below found "the error did not contribute significantly to the verdict." *Id.* It also concluded the prosecutor's improper question about the details of the drunk driving homicide was improper but "the prejudicial effect was not great." *Id.* With respect to the prosecutor's closing argument, the court found it "did not constitute fundamental error." *Id.* at 538-540.

The Court of Appeals also held that the trial court's remarks and instructions to the jurors on the two occasions when they reported deadlocks did not coerce a verdict although that court acknowledged the trial court gave an instruction twice disapproved the Arizona Supreme Court. *Id.* at 541-542.

Petitioner urges this Court to grant review in order to give guidance about the role of other constitutional errors in determining whether a particular constitutional error is harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth in this Petition, Max A. Dunlap respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Arizona.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STAGE WHERE FEDERAL QUESTIONS RAISED

Prior to trial Dunlap moved to dismiss the murder indictment because of the hiatus in prosecution (SR I 334-424). He specifically relied on the due process clause of the Fourteenth Amendment, United States Constitution (SR I 334). His motion was denied by the trial court, and the Court of Appeals of Arizona specifically rejected both his due process and his speedy trial claims. *State v. Dunlap*, 930 P.2d 518, 526-528 (Ariz. App. Div. 1 1996).

During the cross-examination of John Adamson Dunlap attempted to inquire about the "Zobel letter" and offered it as an exhibit; the trial court prohibited any questioning by the defense concerning the letter (TE 3/1/93 58-65; 3/2/93 45-46, 94). On appeal Dunlap urged that he had been denied his right to confront Adamson contrary to the Sixth and Fourteenth Amendments, United States Constitution, and the Court of Appeals held that he was denied that right but that the error was harmless. 930 P.2d at 530-534.

The government moved to admit the grand jury testimony of Harold Bone (R 78), and Dunlap objected (R 79). The trial court permitted introduction of that testimony (TE 3/15/93, 12). The Arizona Court of Appeals addressed the question of whether admission of that testimony violated the confrontation clause contrary to the Sixth and Fourteenth Amendments, United States Constitution, but found that it did not or, alternatively, that any error was harmless. 930 P.2d at 536-537.

930 P.2d 518
(Cite as: 930 P.2d 518)

STATE of Arizona, Appellee,
v.
Max A. DUNLAP, Appellant.
No. 1 CA-CR 94-0068.
Court of Appeals of Arizona,
Division 1, Department B.
Sept. 5, 1996.
Review Denied Jan. 14, 1997.

Defendant was convicted in the Superior Court, Maricopa County, Howard F. Thompson, J., of first-degree murder and first-degree conspiracy, and defendant appealed. The Supreme Court, Gordon, J., 125 Ariz. 104, 608 P.2d 41, reversed and remanded for new trial. Charges were dismissed without prejudice. The United States District Court for the District of Arizona, Muecke, Chief Judge, denied defendant's complaint seeking immediate retrial. State filed complaint against defendant, and he was convicted in the Superior Court, Maricopa County, Cause No. CR-90-13262, Norman D. Hall, J., of first-degree murder and conspiracy to commit obstructing a criminal investigation or prosecution, influencing witness, and receiving bribe by witness. Defendant appealed. The Court of Appeals, Voss, J., held that: (1) speedy trial requirement was not implicated; (2) defendant failed to establish that ten-year delay from time first-degree murder charge was dismissed without prejudice until it was refiled violated due process; (3) defendant failed to establish that his due process rights were violated because police lost or destroyed documents from certain police files; (4) refusing defendant's requested jury instruction was not an abuse of discretion; (5) error in failing to permit defense counsel to cross-examine state witness was harmless; (6) admission of statement by victim's wife, although erroneous, was not so prejudicial that new trial was warranted; (7) prosecutor did not engage in improper vouching; (8) denying request for *Willits* instruction was not abuse of discretion; (9) *Allen* charge did not deny defendant fair trial from independent jury; and (10) denying motion to vacate judgment on ground of newly discovered evidence was not an abuse of discretion.

Affirmed.

[1] CRIMINAL LAW k577.14 110k577.14
Speedy trial requirement was not implicated by ten-year delay from time first-degree murder charge was dismissed without prejudice until it was refiled. U.S.C.A. Const.Amend. 6.

[2] CRIMINAL LAW k577.8(2) 110k577.8(2)
If defendant is not under arrest and no indictment or charge is outstanding, speedy trial provisions of Sixth Amendment do not apply. U.S.C.A. Const.Amend. 6.

[3] CRIMINAL LAW k577.14 110k577.14
Sixth Amendment speedy trial provisions are not implicated if government dismisses charges in good faith and later refiles them, as long as defendant has not been subjected to actual restraints on his liberty after dismissal. U.S.C.A. Const.Amend. 6.

[4] CRIMINAL LAW k145.5 110k145.5
Prior to arrest and official accusation, statutes of limitation provide primary guarantee against bringing overly stale criminal charges.

[5] CONSTITUTIONAL LAW k265 92k265
Defendant failed to establish that ten-year delay from time first-degree murder charge was dismissed without prejudice until it was refiled violated due process; defendant failed to show that delay was intended to gain tactical advantage and that delay actually and substantially prejudiced him. U.S.C.A. Const.Amend. 14.

[5] CRIMINAL LAW k577.14 110k577.14
Defendant failed to establish that ten-year delay from time first-degree murder charge was dismissed without prejudice until it was refiled violated due process; defendant failed to show that delay was intended to gain tactical advantage and that delay actually and substantially prejudiced him. U.S.C.A. Const.Amend. 14.

[6] CONSTITUTIONAL LAW k265 92k265
Defendant, alleging preindictment delay violated due process, has heavy burden to prove that delay caused actual prejudice; proof must be definite and not speculative. U.S.C.A. Const.Amend. 14.

[7] CONSTITUTIONAL LAW k265 92k265
To make showing of actual and substantial prejudice, for purposes of establishing that preindictment delay violated due process, it is not enough to show mere passage of time nor to offer some suggestion of speculative harm; rather defendant must present concrete evidence showing material harm. U.S.C.A. Const. Amend. 14.

[8] CONSTITUTIONAL LAW k265 92k265
Length of preindictment delay is not determinative of whether there has been a due process violation. U.S.C.A. Const. Amend. 14.

[9] CONSTITUTIONAL LAW k265 92k265
Death of witness alone is insufficient to establish prejudice, for purposes of claim that preindictment delay violated due process; it must be shown that witness would have testified, jury would have found witness credible, and testimony of witness would have affected outcome of trial. U.S.C.A. Const.Amend. 14.

[10] CONSTITUTIONAL LAW k265 92k265
Diminished recollection by witnesses does

not, by itself, constitute type of substantial prejudice warranting finding of due process violation based on preindictment delay. U.S.C.A. Const.Amend. 14.

[11] CONSTITUTIONAL LAW k268(5) 92k268(5) Defendant failed to establish that his due process rights were violated because police lost or destroyed documents from certain police files; although specific contents of lost or destroyed documents were unknown, their exculpatory value was not apparent and there was no evidence demonstrating police acted in bad faith. U.S.C.A. Const.Amend. 14; A.R.S. Const. Art. 2, s 4.

[12] CONSTITUTIONAL LAW k268(5) 92k268(5) Due process clause requires state to preserve evidence in criminal prosecution that is of constitutional materiality; such evidence must both possess exculpatory value that was apparent before evidence was destroyed and be of such nature that defendant would be unable to obtain comparable evidence by other reasonably available means. U.S.C.A. Const. Amend. 14.

[13] CONSTITUTIONAL LAW k268(5) 92k268(5) If state fails to preserve evidence which is not material exculpatory evidence, but which might have exonerated criminal defendant, unless defendant can show bad faith on part of police, failure to preserve potentially useful evidence does

not constitute denial of due process. U.S.C.A. Const.Amend. 14.

[14] CONSTITUTIONAL LAW k268(5) 92k268(5)
Presence or absence of police officer's bad faith, for purposes of determining whether state's failure to preserve potentially useful evidence violates due process, turns on officer's knowledge of exculpatory value of evidence at time it was lost or destroyed. U.S.C.A. Const. Amend. 14.

[15] CRIMINAL LAW k829(13) 110k829(13)
Refusing defendant's requested jury instruction, indicating that defendant had previously been convicted of murder and sentenced to death, that Supreme Court reversed conviction and that jury was not to consider this in any way, shape or form in deliberations, was not an abuse of discretion; substance of requested instruction was adequately covered in other instructions.

[16] CRIMINAL LAW k396(2) 110k396(2)
Trial court erred in excluding portions of letter written by state witness who claimed defendant hired him to commit murder and from which state read excerpts in defendant's murder trial under rule, providing when writing is introduced by party, adverse party may require introduction at that time of any other part or any other writing which ought in fairness to be considered contemporaneously with it; contrary to trial

court's expressed view, rule did not require defendant to introduce excluded portions immediately after introduction of portions. 17A A.R.S. Rules of Evid., Rule 106.

[17] CRIMINAL LAW k396(2) 110k396(2)
Under "doctrine of completeness," excluded portions of writing may be required to be read, if necessary, to explain admitted portion, place admitted portion in context, avoid misleading trier-of-fact, and insure fair and impartial understanding of writing.

See publication Words and Phrases for other judicial constructions and definitions.

[18] CRIMINAL LAW k662.7 110k662.7
Failure to permit defense counsel to cross-examine state witness who claimed defendant hired him to commit murder about meaning of excluded portions of letter written by state witness and from which state read excerpts in defendant's murder prosecution violated defendant's right to cross-examine witnesses; state's purpose in reading portions of letter was to bolster state's position that, despite his immoral character, state witness was credible and defendant was precluded from rebutting this inference by cross-examining state witness on whether letter may have also indicated he could be influenced to testify in certain manner

because of financial motive. U.S.C.A. Const.Amend. 6.

[19] CRIMINAL LAW k662.1 110k662.1
Right of confrontation, which includes right to cross-examine witnesses, is fundamental right. U.S.C.A. Const.Amend. 6.

[20] WITNESSES k270(1) 410k270(1)
Cross-examination may be restricted based on concerns for harassment, prejudice, confusion of issues, safety of witness, or marginal relevance.

[20] WITNESSES k280 410k280
Cross-examination may be restricted based on concerns for harassment, prejudice, confusion of issues, safety of witness, or marginal relevance.

[21] CRIMINAL LAW k1170.5(5) 110k1170.5(5)
Conviction may be reversed if cross-examination has been unreasonably limited.

[22] CRIMINAL LAW k662.7 110k662.7
Defendant has Sixth Amendment right to cross-examine witness concerning his bias, motive, and prejudice, and cross-examination for this purpose is especially important where credibility of key government witness is central factor to be weighed by trier of fact. U.S.C.A. Const.Amend. 6.

[23] CRIMINAL LAW k662.7 110k662.7
Term "bias," for purposes of defendant's

right to cross-examine witness concerning his bias, is shorthand reference to all forms of partiality that may be proven by extrinsic evidence and includes interest, motive, and corruption. U.S.C.A. Const. Amend. 6. See publication Words and Phrases for other judicial constructions and definitions.

[24] CRIMINAL LAW k1168(2) 110k1168(2)
Violations of defendant's confrontation rights is harmless error if appellate court can say beyond reasonable doubt that error did not affect the verdict. U.S.C.A. Const.Amend. 6.

[25] CRIMINAL LAW k1170.5(1) 110k1170.5(1)
Error in failing to permit defense counsel to cross-examine state witness, who claimed defendant hired him to commit murder, about meaning of excluded portions of letter written by state witness and from which state read excerpts in defendant's murder prosecution was harmless; possible inference from excluded letter portions that state witness was willing to alter his testimony for money could not have attacked state witness's credibility more thoroughly than was already accomplished, so that error only excluded cumulative evidence and did not affect verdict. U.S.C.A. Const.Amend. 6.

[26] CRIMINAL LAW k419(1.5) 110k419(1.5)
Admission of statement by murder victim's wife to detective that, at time of

bombing, victim had been investigating two people and that corporation was always subject of interest to victim, but he was not working on corporation matter at that time, was inadmissible hearsay; statement was offered to prove that victim was investigating two people at time of his death.

[27] WITNESSES k390 410k390
Detective's testimony in murder prosecution that victim's wife told detective that at time of bombing, victim had been investigating two people and that corporation was always subject of interest to victim, but he was not working on corporation matter at that time, was not admissible as impeachment evidence to attack wife's credibility; other hearsay statements by wife had not been admitted. 17A A.R.S. Rules of Evid., Rule 806.

[28] CRIMINAL LAW k419(2) 110k419(2)
Statement of victim's wife that prior to car bombing, husband was investigating family and their connection to organized crime, elicited by state to show inadequacy of investigation and not for truth of matter asserted, was not hearsay. 17A A.R.S. Rules of Evid., Rule 801(c).

[29] CRIMINAL LAW k1169.2(6) 110k1169.2(6)
Admission of statement by murder victim's wife to detective that, at time of bombing, victim had been investigating two

people and that corporation was always subject of interest to victim, but he was not working on corporation matter at that time, although erroneous, was not so prejudicial that new trial was warranted; statement was merely cumulative to other evidence presented by state on same point.

[30] CRIMINAL LAW k422(1) 110k422(1)
Coconspirator's statements are admissible when it has been shown that conspiracy exists and defendant and declarant are parties to conspiracy.

[31] CRIMINAL LAW k423(1) 110k423(1)
When inquiring whether statement of coconspirator was made in furtherance of conspiracy, for purposes of determining whether statement is admissible against defendant, courts focus on intent of coconspirator in advancing goals of conspiracy, not on whether statement has actual effect of advancing those goals.

[32] CRIMINAL LAW k1147 110k1147
"Abuse of discretion," for purposes of assessing whether trial court properly determined that statements of coconspirator were admissible against defendant, is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

See publication Words and Phrases for other judicial constructions and definitions.

[33] CRIMINAL LAW k423(9) 110k423(9)
Determination that entries in diaries were made in furtherance of conspiracy, for purpose of determining whether entries were admissible in murder prosecution as statements by coconspirator made during course and in furtherance of conspiracy, was not an abuse of discretion; to extent coconspirator may have used entries to help him formulate or carry out conspiracy, they were in furtherance of conspiracy. 17A A.R.S. Rules of Evid., Rule 801(d)(2)(E).

[34] CRIMINAL LAW k543(1) 110k543(1)
Grand jury testimony of murder defendant's friend, who died prior to trial, contained adequate guarantees of trustworthiness to satisfy requirements of Confrontation Clause and evidentiary rule, allowing statements of unavailable witness to be admitted if they do not fit another hearsay exception; witness was under oath, testified to matters within his personal knowledge, never recanted his testimony, had no motive to harm defendant by lying, and had no relationship with government such as informant or agent, and his testimony was proffered only as circumstantial evidence of defendant's guilt. U.S.C.A. Const.Amend. 6; 17A A.R.S. Rules of Evid., Rule 804(b)(5).

[34] CRIMINAL LAW k662.60 110k662.60
Grand jury testimony of murder defendant's friend, who died prior to trial, contained adequate guarantees of

trustworthiness to satisfy requirements of Confrontation Clause and evidentiary rule, allowing statements of unavailable witness to be admitted if they do not fit another hearsay exception; witness was under oath, testified to matters within his personal knowledge, never recanted his testimony, had no motive to harm defendant by lying, and had no relationship with government such as informant or agent, and his testimony was proffered only as circumstantial evidence of defendant's guilt. U.S.C.A. Const.Amend. 6; 17A A.R.S. Rules of Evid., Rule 804(b)(5).

[35] CRIMINAL LAW k662.9 110k662.9
In order for admission of hearsay statement of unavailable witness to not violate confrontation clause, statement must have particularized guarantees of trustworthiness, shown from totality of circumstances that surround making of statement and render declarant particularly worthy of belief. U.S.C.A. Const.Amend. 6.

[36] CRIMINAL LAW k1169.1(9) 110k1169.1(9)
Even if trial court erred in admitting in murder prosecution the grand jury testimony of defendant's friend, who died prior to trial, error was harmless; jury was well aware of weakness in friend's testimony and testimony may have bolstered defendant's theory.

[37] WITNESSES k345(2) 410k345(2)
Determining that defense witness' con-

viction was less than ten years old and admissible for impeachment purposes in defendant's murder prosecution was erroneous; trial court included probationary period in calculating ten-year period. 17A A.R.S. Rules of Evid., Rule 609(b).

[38] CRIMINAL LAW k1170.5(1) 110k1170.5(1)
Error in determining that defense witness' conviction was less than ten years old and admissible for impeachment purposes in defendant's murder prosecution was harmless; witness' prior conviction did not influence verdict. 17A A.R.S. Rules of Evid., Rule 609(b).

[39] CRIMINAL LAW k730(3) 110k730(3)
Trial court did not abuse its discretion in denying motion for mistrial on ground that once trial court allowed evidence of defense witness' conviction into evidence, prosecutor inquired about underlying facts of conviction; prejudicial effect was not great as prosecution did not again refer to details of witness' conviction, and trial court sustained objection to prosecution's question and instructed jury to disregard any questions to which objections were sustained.

[40] CRIMINAL LAW k1144.15 110k1144.15
Juries are presumed to follow their instructions.

[41] CRIMINAL LAW k720(5) 110k720(5)
"Prosecutorial vouching" occurs either

where prosecutor places prestige of government behind its witness or where prosecutor suggests information not presented to jury supports witness' testimony. See publication Words and Phrases for other judicial constructions and definitions.

[42] CRIMINAL LAW k1037.1(2) 110k1037.1(2)
Defendant waived issue of whether prosecution engaged in improper vouching, absent fundamental error, where defendant did not object to challenged comments.

[43] CRIMINAL LAW k720(5) 110k720(5)
Statement in prosecutor's closing argument, providing jury was not to worry about whether or not uncharged person was also involved as that is prosecution's job, did not constitute improper vouching in murder prosecution; argument simply informed jury state might still pursue person if evidence arose and focused jury on duty to determine whether defendant was guilty.

[44] CRIMINAL LAW k720(5) 110k720(5)
Statement in prosecutor's closing argument that after case is over "if you want to talk to us about anything about the case, you can talk to us privately. We'd like to talk to you privately. We'd like to talk to you about credibility of witnesses." Did not constitute improper vouching in murder prosecution; statement indicated prosecutors wanted to collect feedback from jurors regarding their presentation

of case, common self-improvement technique among litigators.

[45] CRIMINAL LAW k730(8) 110k730(8)
Even if prosecutor was vouching, conduct did not unfairly prejudice defendant or deny him right to fair trial warranting new trial; prosecutor's statements were subject to more than one interpretation and rather obscure and trial court twice instructed jury that counsels' arguments were not evidence, thus mitigating effects of statements. U.S.C.A. Const.Amend. 6.

[46] CRIMINAL LAW k1037.1(2) 110k1037.1(2)
Defendant waived issue of whether prosecutor improperly presented personal opinion during closing argument, absent fundamental error, where defendant did not object to challenged comments.

[47] CRIMINAL LAW k719(3) 110k719(3)
Prosecutor's comments during closing argument in murder prosecution did not constitute fundamental error; although comments in part expressed prosecutor's personal opinion that state witness, who claimed defendant hired him to commit murder, justifiably sought better plea bargain, much of comments were argument that state witness was telling truth because witness was no longer subject to death penalty and, although comments failed to mention witness' exposure to life imprisonment without plea agreement, defense counsel's closing argument clarified any misunderstanding.

[47] CRIMINAL LAW k1037.1(2) 110k1037.1(2) Prosecutor's comments during closing argument in murder prosecution did not constitute fundamental error; although comments in part expressed prosecutor's personal opinion that state witness, who claimed defendant hired him to commit murder, justifiably sought better plea bargain, much of comments were argument that state witness was telling truth because witness was no longer subject to death penalty and, although comments failed to mention witness' exposure to life imprisonment without plea agreement, defense counsel's closing argument clarified any misunderstanding.

[48] CRIMINAL LAW k778(10) 110k778(10) In order to be entitled to *Willits* instruction, providing that if state destroys evidence, contents or quality of which is at issue, jury may infer that true facts are against state's interest, defendant must prove that state failed to preserve material evidence that was accessible and which might tend to exonerate him and that failure resulted in prejudice to defendant.

[49] CRIMINAL LAW k778(10) 110k778(10) Trial court did not abuse its discretion in denying defendant's request for *Willits* instruction, providing if state destroys evidence, contents or quality of which is at issue, jury may infer that true facts are against state's interest; defendant did not establish that evidence state

failed to preserve would have had tendency to exonerate him or that he suffered actual prejudice as result of state's failure to preserve evidence.

[50] CRIMINAL LAW k865(1) 110k865(1)
Totality of circumstances must be considered in determining whether defendant received a fair trial at hands of independent jury, members of which were free from intimidation or undue pressure. U.S.C.A. Const.Amend. 6.

[51] CRIMINAL LAW k865(1) 110k865(1)
Court will find coerciveness if, under totality of circumstances, trial court's actions or remarks displaced independent judgment of jurors.

[52] CRIMINAL LAW k865(1.5) 110k865(1.5)
Allen charge, telling jurors they had not deliberated nearly long enough, did not deny defendant fair trial from independent jury; trial court did not know numerical division of jurors' votes or which way jury was leaning and there was no reason for juror to believe *Allen* charge was aimed at him or her or at jurors inclined to vote one way or other. U.S.C.A. Const.Amend. 6.

[53] CRIMINAL LAW k865(1.5) 110k865(1.5)
While trial court should not have used supplemental instruction, providing it is desirable if you reasonably can agree upon verdict, and for parties involved in case it is an important one, and there is no

reason to believe that case could ever be submitted to jury more competent to decide it, instruction did not impermissibly pressure jurors to reach verdict or deny defendant fair trial by independent jury; trial court implored jurors to maintain their independent judgment and did not know numerical division of jurors' votes or whether jury favored particular verdict. U.S.C.A. Const.Amend. 6.

[54] CRIMINAL LAW k998(10) 110k998(10)
Denying murder defendant's motion to vacate judgment on ground of newly discovered evidence was not an abuse of discretion; proffered witness was not credible and witness' testimony was not newly discovered evidence. 17 A.R.S. Rules Crim.Proc., Rules 24.2, subd. a(2), 32.1.

*524 Grant Woods, Attorney General by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section, and Warren J. Granville, Carolyn K. Passamonte, Assistant Attorneys General, Phoenix, for Appellee. Margaret O'Donnell, and McNally & Robinson by Kevin McNally and Gail Robinson, Frankfort, KY, for Appellant.

OPINION

VOSS, Judge.

Max A. Dunlap (defendant) appeals his convictions for first degree murder and conspiracy to commit obstructing a criminal investigation or prosecution, influencing a witness, and receiving a bribe by a witness. We affirm.

PROCEDURAL HISTORY

This case arises out of the car bombing murder of investigative reporter Don Bolles on June 2, 1976. Bolles' admitted murderer was John Harvey Adamson. Adamson claimed that defendant hired him to commit the murder and that former co-defendant, James Robison, assisted him. In 1977, Adamson entered into a plea agreement with the state in which he pled guilty to second degree murder. The agreement contained a stipulation that Adamson would receive a forty-eight to forty-nine-year sentence with a total incarceration time of twenty years and two months. In exchange, Adamson agreed to and did testify against Dunlap and Robison at their joint trials for first degree murder and conspiracy. Both Dunlap and Robison were convicted and sentenced to death on the murder charge. The Arizona Supreme Court reversed their convictions and remanded for new trials. *State v. Dunlap*, 125 Ariz. 104, 608 P.2d 41 (1980); *State v. Robison*, 125 Ariz. 107, 608 P.2d 44 (1980).

Adamson refused to testify in the retrials of Dunlap and Robison and attempted to exact a more favorable plea agreement. The state refused to negotiate with Adamson, treated Adamson's refusal to testify as a breach of the 1977 plea agreement, and reinstated first degree murder charges against him. Adamson unsuccessfully sought relief from the state's action in the Arizona Supreme Court. *Adamson v. Superior Court,* 125 Ariz. 579, 611 P.2d 932 (1980). After the Arizona Supreme Court ruled against him, Adamson offered to testify at the retrials of Dunlap and Robison, but the state declined the offer. Adamson unsuccessfully sought habeas corpus relief in federal court from the supreme court ruling. *Adamson v. Hill,* 667 F.2d 1030 (9th Cir.1981), cert. denied, 455 U.S. 992, 102 S.Ct. 1619, 71 L.Ed.2d 853 (1982). Adamson was convicted of first degree murder and sentenced to death, and the Arizona Supreme Court affirmed his conviction. *State v. *525 Adamson,* 136 Ariz. 250, 665 P.2d 972, cert. denied, 464 U.S. 865, 104 S.Ct. 204, 78 L.Ed.2d 178 (1983).

Adamson spent the next several years in federal court attacking his conviction and death sentence, and eventually succeeded in having his death sentence overturned. See generally *Adamson v. Ricketts,* 758 F.2d 441 (9th Cir.1985); *Adamson v. Ricketts,* 789 F.2d 722 (9th Cir.1986) (en banc), *rev'd,* 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987); *Adamson v. Ricketts,* 865 F.2d 1011 (9th Cir.1988) (en banc), *cert. denied,* 497 U.S. 1031, 110 S.Ct. 3287, 111 L.Ed.2d 795 (1990); *Adamson v. Lewis,* 955 F.2d 614 (9th Cir.), *cert. denied,* 505 U.S. 1213, 112 S.Ct. 3015, 120 L.Ed.2d 888 (1992). In 1991, during the pendency of the last appeal, the state and Adamson entered into a stipulation and cooperation agreement that essentially reinstated the 1977 plea agreement requiring Adamson to testify against Dunlap and Robison.

In the meantime, the charges against Dunlap were dismissed without prejudice on June 2, 1980. Dunlap unsuccessfully sought an immediate retrial. *Dunlap v. Corbin*, 532 F.Supp. 183 (D.Ariz.1981), *aff'd*, 673 F.2d 1337 (9th Cir.1982). On December 19, 1990, the state filed a criminal complaint against defendant and Robison for first degree murder and conspiracy to commit obstructing a criminal investigation or prosecution, influencing a witness, and receiving a bribe by a witness. On July 2, 1991, the state filed an information against them on the same charges. The cases were later severed. Defendant was convicted by a jury of both charges. He received a life sentence on the murder charge and a two-year concurrent sentence on the conspiracy to obstruct investigation and prosecution charge.

FACTS

Adamson was immediately linked to the Bolles murder. On the pretext of providing newsworthy information to Bolles, Adamson arranged to meet Bolles on June 2, 1976, at a hotel in Phoenix to carry out the car bombing. Bolles survived the explosion and uttered the words "John Adamson" and "Adamson sent me" to onlookers. Bolles died on June 13, 1976. Adamson was the state's key witness at trial. A career criminal, he testified he met defendant in 1974 through attorney Neal Roberts and had four or five business dealings with defendant prior to the Bolles murder. He testified that in March of 1976, Adamson, defendant, and others were present at a meeting in Roberts' office. After the meeting, defendant approached Adamson and asked him how much it would cost to have two individuals killed. Defendant explained that his long-time friend and benefactor, Kemper Marley, wanted then Attorney General Bruce Babbitt and a former employee, Al Lizanetz dead. Marley was a prominent business and political leader who owned a liquor wholesale distributing company. He had been nominated for a vacancy on the state Racing Commission by then Governor Raul Castro. The stated reason Marley wanted these individuals murdered was because Babbitt planned to initiate an investigation into price-fixing in the liquor industry, and Lizanetz had embarrassed Marley over the years by making public accusations against him. Two weeks later, defendant contacted Adamson and asked him how much it would cost to have Babbitt, Lizanetz, and Don Bolles killed. Defendant said Bolles had given Marley a "bad time" about Marley's nomination to the Racing Commission and "was going to start on something soon." He said Bolles had to go first. Adamson told defendant it would cost $50,000 to kill the three individuals and that he needed

$5000 as a down payment. Adamson said defendant gave him $2000 at that meeting.

Adamson had known James Robison for four years and had worked with him on other bombings in connection with insurance scams. Adamson asked Robison to assist him with the three murders and promised to split the money with him. Adamson testified in detail about designing and constructing the explosive device with Robison and their plan to carry out the bombing. Adamson met with defendant several times prior to the bombing. Defendant told him he would pay Adamson the remainder owed him after the bombing. Adamson told defendant *526 he previously made arrangements for defendant to leave the money in a package at attorney Tom Foster's office.

According to Adamson, he planted the bomb and went to a local bar while Robison detonated it. After the explosion, Robison called Adamson. When Adamson asked if it was done, Robison said, "[E]yeball to eyeball ... send Mr. Smith to the bank." Adamson testified "Mr. Smith" was a coded expression for "Mr. Dunlap."

Adamson went to Tom Foster's office several times to get the package from defendant. On June 10, 1976, Adamson met defendant there and received an envelope containing almost $6000, mostly in small bills. Adamson was arrested shortly thereafter.

The state also presented evidence to support the conspiracy to obstruct charge. Bette Gleason, Robison's self-described

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common-law wife, testified that from the spring of 1977 through the fall of 1979, she received $1500 for a new truck and around $500 per month in cash. She obtained the money from Robison's attorney, David Derickson, who in turn received it from defendant's attorney, John Savoy. Savoy was collecting money for defendant's legal defense fund and diverted some of those funds to Bette Gleason. In addition, the state presented evidence of other gifts and money sent to Robison directly from defendant or indirectly through third parties. The state claimed these gifts were given to keep Robison quiet and because defendant was grateful Robison had not testified against him. The state also claimed defendant burned and shredded documents to cover up his involvement in the murder.

Defendant maintained his innocence and alleged that Adamson framed him. The apparent reason for this frame-up was to avert retaliation by defendant after Adamson defrauded defendant in a business deal. Defendant admitted he delivered money to Tom Foster's office. However, he claimed a stranger came to his house on the morning of June 10, 1976, carrying a brown paper bag containing money. The stranger, who said Neal Roberts wanted a favor from him, told defendant to change the money into smaller bills and deliver it to Tom Foster's office that day.

Defendant advanced an alternative theory for the bombing. According to him, at the time of his death, Bolles was

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investigating dog track owners, Emprise Corporation, and the Bradley Funk family. Bolles had testified before a congressional committee that was investigating Emprise, the Funks, and their tie to organized crime. Defendant suggested that Adamson, who sometimes worked at the race track, was connected to Bradley Funk and carried out the murder for Emprise and the Funks.

Defendant also claimed the investigation was misdirected and mishandled. Defendant presented evidence of unauthorized purging by the police department of the "76-86" file (the police department file on the Bolles bombing), file 851 (the Emprise file), the Organized Crime Bureau file, and certain surveillance records. In defense of the conspiracy to obstruct charge, defendant claimed he and Robison became acquainted after they were both convicted and sentenced to death, and that he gave gifts and money to Robison out of friendship. Defendant raises several issues on appeal.

DISCUSSION

A. Were There Due Process Violations Requiring Dismissal of the Indictment Because of Pre-indictment Delay or Because the Police Lost or Destroyed Evidence?

1. Pre-indictment Delay

[1] Defendant first alleges that the ten-year delay from the time the first degree murder charge was dismissed without prejudice in 1980 until it was refiled in 1990 violated both the speedy trial provisions of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. We reject this argument.

[2][3] If a defendant is not under arrest and no indictment or charge is outstanding, the speedy trial provisions of the Sixth Amendment do not apply. *United States v. Marion*, 404 U.S. 307, 313-15, 92 S.Ct. 455, *527 459-61, 30 L.Ed.2d 468 (1971); *State v. Williams*, 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995). Similarly, the Sixth Amendment is not implicated if the government dismisses charges in good faith and later refiles them, as long as a defendant has not been subjected to actual restraints on his liberty after dismissal. *United States v. Loud Hawk*, 474 U.S. 302, 310-11, 106 S.Ct. 648, 653-54, 88 L.Ed.2d 640 (1986); *United States v. MacDonald*, 456 U.S. 1, 6-8, 102 S.Ct. 1497, 1500-02, 71 L.Ed.2d 696 (1982). The case of *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), relied on by defendant, is distinguishable because there, under an unusual North Carolina procedural device known as the "nolle prosequi with leave," the prosecution was halted, the defendant was released from custody, but the indictment was never dismissed.

[4] Prior to arrest and official accusation, statutes of limitation provide the "primary guarantee against bringing overly stale criminal charges." *United States v. Ewell,* 383 U.S. 116, 122, 86 S.Ct. 773, 777, 15 L.Ed.2d 627 (1966). The crime of first degree murder has no statute of limitation. Ariz.Rev.Stat. Ann. § (A.R.S. §) 13-107(A) (formerly A.R.S. § 13- 106(A)). However, such statutes "do[ ] not fully define [defendant's] rights with respect to the events occurring prior to the indictment." *Marion,* 404 U.S. at 324, 92 S.Ct. at 465. "[T]he Due Process Clause has a limited role to play in protecting against oppressive delay." *United States v. Lovasco,* 431 U.S. 783, 789, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977).

[5] For pre-indictment delay to violate due process, a defendant must show that (1) the delay was intended to gain a tactical advantage or to harass him, and (2) the delay actually and substantially prejudiced him. *Williams,* 183 Ariz. at 379, 904 P.2d at 448. The Supreme Court in *Lovasco* stated that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." 431 U.S. at 790, 97 S.Ct. at 2048-49. "Under the two-pronged test of *Lovasco,* as interpreted by the lower courts, it will be extremely difficult for a defendant to prevail on his due process claim." Wayne

R. LaFave & Jerold H. Israel, Criminal Procedure § 18.5, at 428 (1984).

a. Reason for Delay

Defendant claims the state had no legitimate reason for the delay in refiling murder charges against him because Adamson expressed his willingness to testify in the retrials of defendant and Robison in 1980. Defendant claims the delay was an intentional attempt to gain a tactical advantage over him. We disagree.

After Adamson breached his 1977 plea agreement, the state had a right to prosecute him on the original first degree murder charge. This prosecution occasioned an extended appellate process. Regardless whether the state's actions in this appellate process were unfair in some sense to defendant, there is no evidence the delay was intended to gain a tactical advantage over defendant or to harass him. *State v. Hall*, 129 Ariz. 589, 593, 633 P.2d 398, 402 (1981). The state also continued to investigate other possible theories and suspects, and to develop its case in connection with the conspiracy to obstruct charge. Defendant has not shown that the state delayed to gain a tactical advantage over him. *See Lovasco*, 431 U.S. at 792-93, 97 S.Ct. at 2049-50.

b. Prejudice

[6][7][8] "[A] defendant has a heavy burden to prove that pre-indictment delay

caused actual prejudice; the proof must be definite and not speculative." *State v. Broughton*, 156 Ariz. 394, 397-98, 752 P.2d 483, 486- 87 (1988). To make a showing of actual and substantial prejudice, "it is not enough to show the mere passage of time nor to offer some suggestion of speculative harm; rather the defendant must present concrete evidence showing material harm." *United States v. Anagnostou*, 974 F.2d 939, 942 (7th Cir.1992), *cert. denied*, 507 U.S. 1050, 113 S.Ct. 1943, 123 L.Ed.2d 649 (1993). The length of the delay is not determinative of whether there has been a due process violation. *Pharm v. Hatcher*, 984 F.2d 783, 785-86 (7th Cir.), *cert. denied*, 510 U.S. 841, 114 *528 S.Ct. 125, 126 L.Ed.2d 89 (1993) (no due process violation in thirteen-year delay between crime and trial); *Wilson v. McCaughtry*, 994 F.2d 1228, 1234 (7th Cir.1993) (no due process violation in sixteen-year delay between crime and indictment); *Stoner v. Graddick*, 751 F.2d 1535, 1543 (11th Cir.1985) (no due process violation for nineteen-year delay between crime and filing charges); *Story v. State*, 721 P.2d 1020, 1028-29 (Wyo.), *cert. denied*, 479 U.S. 962, 107 S.Ct. 459, 93 L.Ed.2d 405 (1986) (no due process violation in charging defendant with crimes committed seventeen years earlier).

[9] Defendant first contends he was prejudiced because material witnesses had died. However, the death of a witness

alone is insufficient to establish prejudice; it must be shown that the witness would have testified, the jury would have found the witness credible, and the testimony of the witness would have affected the outcome of the trial. *United States v. Doerr*, 886 F.2d 944, 964 (7th Cir.1989). In particular, defendant claims the death of Robert Sprouse deprived him of vital testimony. Sprouse had mafia connections and allegedly had information from these sources that Neal Roberts arranged the Bolles murder and set up Marley and defendant to take the blame. Sprouse was incarcerated in a Missouri prison and committed suicide in 1989.

Defendant failed to make an adequate showing of prejudice. First, whether Sprouse's testimony as to what others told him would be admissible under the rules of evidence is unclear. Second, Sprouse's credibility would be subject to serious impeachment because of his criminal background, and third, there is no reasonable basis to assume the jury's verdicts would have been different with his testimony.

Defendant also alleges that the deaths of Bradley Funk and Kemper Marley prejudiced his defense. However, he has not shown that either person would have testified at trial and he has not revealed what their testimony would have been. Although prior testimony of other deceased witnesses was read during the trial, defendant has failed to show actual, substantial prejudice due to Funk's and

Marley's unavailability to testify which would constitute a due process violation.

[10] Defendant next claims that he was prejudiced because some witnesses were unable to recall with specificity the events occurring many years earlier. However, "diminished recollection by witnesses does not, by itself, constitute the type of substantial prejudice warranting a finding of a due process violation." *Broughton*, 156 Ariz. at 398, 752 P.2d at 487 (citations omitted). Defendant's argument that the witnesses' memory loss prejudiced his case is purely speculative. Finally, as discussed below, defendant's claim that lost or destroyed documents may have contained exculpatory evidence and their absence substantially prejudiced his case is also based on conjecture. Defendant has not shown that pre-indictment delay violated his due process rights requiring dismissal of the indictment.

2. Lost or Destroyed Evidence

[11] Defendant claims that his due process rights were violated because the police lost or destroyed documents from certain police files. A former Phoenix police officer testified he was ordered by his superiors to remove all information from the Emprise file relating to the Funk family and Adamson. He removed approximately six pieces of paper. He was then told to renumber and recopy the pages and place them in sequence. He did so to

make it appear as though nothing were missing from the file.

The officer recalled that one page listed the names of people attending a Racing Commission meeting, one page contained a list of people in dog racing with criminal backgrounds, and the other pages concerned attempts by Emprise to obtain a liquor license in Arizona. He thought one page may have contained a reference to Adamson and his connection with dog racing. However, another officer who took possession of the documents removed from the Emprise file did not recall any references to Adamson in them. [FN1] *529 The stated purpose of this purging was to remove non-public records from the files and to safeguard the intelligence process. These documents were never relocated.

FN1. Although there were allegations that one of the items removed from the Emprise file was a photo of Adamson removing a drunk Bradley Funk from an automobile (the "drunk Funk" report), the trial testimony revealed no one actually saw or remembered seeing this photo.

Index cards relating to John Adamson, Mary Adamson, and Kemper Marley were removed from the Organized Crime Bureau indexing file and were kept in an officer's desk until he left the department. He told another officer to retain the cards until the Bolles investigation was completed. This procedure was intended to prevent access to information in the Organized Crime Bureau files relating to those individuals.

The police department conducted an internal affairs investigation after the files were purged. The procedure used in removing documents from the Emprise file and index cards from the Organized Crime Bureau file was admittedly improper and unauthorized. After the investigation, some questions remained unanswered. However, the police officers involved in the purging process testified that they did not intend to frame anyone or to protect others from being investigated.

The 76-86 file that related to the Bolles murder had no connection to the Emprise File. The officer who maintained the 76-86 file never noticed that anything was missing or had been removed. However, he testified that in 1979 the file was four inches thick, but at the time of trial, it was only three- quarters of an inch thick. An officer testified that surveillance worksheets on the Bolles investigation were destroyed, although the surveillance reports, which summarized the worksheets, had been kept. Defendant claims that, because the police improperly removed, lost, or destroyed documents from the Emprise file, the Organized Crime Bureau file, the 76-86 file, and destroyed surveillance worksheets, his due process rights under the Fourteenth Amendment and article two, section four of the Arizona

Constitution were violated and the indictment must be dismissed. We disagree.

[12] The Due Process Clause requires the state to preserve evidence that is of constitutional materiality. Such evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984). The state's duty to preserve is limited to material evidence that "might be expected to play a significant role in the suspect's defense." *Id.* at 488, 104 S.Ct. at 2534. [13][14] The United States Supreme Court has held that the Due Process Clause requires a different analysis if the state fails to preserve evidence which is not material exculpatory evidence, but which "might have exonerated defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58, 109 S.Ct. at 337. Similarly, for purposes of state constitutional due process, our supreme court has held that " '[a] defendant is not deprived of due process by the destruction of evidence unless the state has acted in bad faith or the defendant is prejudiced by the loss.' " *State v.*

Youngblood, 173 Ariz. 502, 507 844 P.2d 1152, 1157 (1993) (*quoting State v. Day*, 148 Ariz. 490, 496, 715 P.2d 743, 749 (1986)). "[I]n the context of a due process analysis, the Supreme Court has made clear that 'bad faith' has less to do with the actor's intent than with the actor's knowledge that the evidence was 'constitutionally material.' " *State v. Walker*, 185 Ariz. 228, 238, 914 P.2d 1320, 1330 (App.1995)(*quoting Arizona v. Youngblood*, 488 U.S. at 57-58, 109 S.Ct. at 337). "The presence or absence of bad faith for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S. at 56, 109 S.Ct. at 336 n*.

Here, the specific contents of the lost or destroyed documents are unknown. The documents might have been exculpatory, but their exculpatory value is not apparent. *530 Therefore, defendant cannot show prejudice in fact. Although the police may have engaged in improper conduct that was contrary to standard police procedure, no evidence demonstrates that they acted in bad faith in a constitutional sense. We find no due process violation under either the federal or state constitutions requiring dismissal of the indictment.

B. Did the Trial Court Fail to Instruct the Jury Adequately Regarding Defendant's Prior Conviction and Sentence?

[15] Defendant requested a jury instruction indicating that he had previously been convicted of Bolles' murder and sentenced to death, and the Arizona Supreme Court reversed the conviction. The proposed instruction advised the jury that it was "not to consider this in any way, shape or form in your deliberations." The judge refused the instruction because other instructions adequately covered the issue. Defendant claims this refusal was error.

The trial court is not required to give a defendant's proposed instruction when its substance is adequately covered in other instructions. E.g., *State v. Walden*, 183 Ariz. 595, 614, 905 P.2d 974, 993 (1995), *cert. denied*, --- U.S. ----, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Here, at the beginning of the trial, the trial court told the jury, "I want you to know that we are starting with a clean slate. As he sits in this courtroom today and henceforth during this trial, Mr. Dunlap is presumed to be innocent." At the close of evidence, the trial court again instructed the jury as to defendant's presumption of innocence and the state's burden of proof. These instructions adequately covered defendant's presumption of innocence. Additionally, the trial court instructed the jury to disregard irrelevant matters when the jury sent a note asking if a previous conviction of defendant would have been admissible in this trial.

Moreover, we have difficulty concluding that the trial court failed to prevent defendant from being prejudiced by evidence of his prior conviction and sentence. Indeed, defendant relied on his prior conviction and reversal by the supreme court to explain his relationship with Robison. Defendant referred to the trial, conviction, and sentence in his opening statement. He cross-examined attorney David Derickson regarding whether anything indicated defendant knew Robison before the men were incarcerated together. Defendant asked Ken Freedman about defendant paying for another death row inmate's legal representation. He questioned Doris Thrasher about ferrying items to Robison for defendant after defendant was released from prison. Lastly, defendant mentioned during closing argument his prior criminal proceedings, his friendship with Robison that began with their arrests, and his generosity toward another death row inmate.

The trial court did not abuse its discretion in refusing defendant's instruction.

C. Did the Trial Court Unreasonably Limit Cross-Examination of John Adamson?

During Adamson's cross-examination, counsel sought to introduce a letter dated October 30, 1976, from Adamson to his then wife Mary. Adamson wrote the letter from jail prior to entering into the plea agreement with the state. The letter referred to a plan between Adamson and his private investigator, John Zobel, and to his prospective agreement with the state. The letter (called the "Zobel letter") reads as follows:

There is [sic] several interesting things which just he [Zobel] and I have planned. Mainly, the defendants of future indictments hire him as investigator with 25% of fees off the top--going to you--which if everything gels should be strong--because of not only his knowledge, but influence with me, if you know what I mean.

The situation with John [Zobel] is actually; my information will in most probability get several people charged with various crimes ranging from murder to arson to fraud to conspiracy. But that in and of itself is not the most important determination of my deal or actions. True, every detail I give them will be checked and double checked in hopes of finding the slightest flaw from which they can conclude the rationalization *531 to cancel any and all agreements in my behalf. So obviously everything must be completely true as I know it. But what will ultimately determine any individual's involvement and subsequent guilt or innocence is the jury itself. There is where the variable is housed; whether I will be an excellent believable witness with no mistakes or would the possibility of my making an honest nervous mistake on the stand, interest some of the individuals involved. *John and I feel the latter will be of considerable financial interest to some of the people involved.* (Emphasis added.) The state objected, and the court excluded the letter as irrelevant.

During redirect examination, in an attempt to rehabilitate Adamson, the state read only those portions of the letter not italicized. The prosecutor asked Adamson what he meant in that letter, and Adamson replied:

Well, what I meant basically was that if I made a deal, that I would have to tell the truth, and I was having a lot of difficulty with the thought of making a deal and testifying against guys that I had known for a long time, and just basically that I was having trouble dealing with it, and that I would have to tell the truth in every detail known to me in the serious cases that were involved, and what I was going to testify if I made a deal.

During recross examination, counsel attempted to read the rest of the letter and to cross-examine Adamson about it. Defendant believed the omitted portions of the letter suggested Adamson had concocted a scheme involving other defendants in order to obtain money for his wife, and also that he might be willing to alter his testimony for a price. The judge ruled that counsel could not do so because it would be improper recross examination. Counsel requested that he be allowed to read the omitted portions later in the read the omitted portions later in the trial. The court ruled that this request was untimely under Rule 106, Arizona Rules of Evidence. After defense counsel explained that the prosecutor had "opened the door" and that, in the interest of fairness, he should be permitted to introduce the other parts of the letter, the court stated:

> I am suggesting to you, Mr. Miller, if you believe that, then you don't understand Rule 106, because that's not how you do that. If you feel that he is reading a portion of a lie and taking it out of context, your responsibility is, at that point, to ask me pursuant to the rule, to require him to read those other parts that you believe, in fairness, are required, not just sit there and then some later time say, I am going over the rest of it on cross-examination, that is not how it works. That is not consistent with the Rules of Evidence. I mean, I am confident about that.

Defendant argues that the court's ruling was incorrect and he was denied the constitutional right to cross-examine Adamson. Although the trial court erred, reversal is not required.

1. Application of Evidence Rule 106

[16] The trial court erred in its interpretation and application of Rule 106, Arizona Rules of Evidence. That rule provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Federal Evidence Rule 106 is the source for the Arizona Rule. *State v. Passarelli*, 130 Ariz. 360, 363, 636 P.2d 138, 141 (App.1981). The advisory committee's note to federal rule 106 states:

> The rule is an expression of the rule of completeness.... The rule is based on two considerations. The first is the misleading impressions created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial.... The rule does not in any way circumscribe the right of the adversary to develop the matter on cross- examination or as part of his own case.

Fed.R.Evid. 106 advisory committee's note (emphasis added).

[17] Under the doctrine of completeness, the excluded portions of a writing may be required to be read, if necessary, to explain *532 the admitted portion, place the admitted portion in context, avoid misleading the trier-of-fact, and insure a fair and impartial understanding of the writing. *United States v. Soures*, 736 F.2d 87, 91 (3d Cir.1984), *cert. denied*, 469 U.S. 1161, 105 S.Ct. 914, 83 L.Ed.2d 927 (1985); *see*

also United States v. Sutton, 801 F.2d 1346 (D.C.Cir.1986).

Contrary to the trial court's expressed view, the rule does not require the adverse party to introduce the excluded portions immediately after introduction of portions of the writing by the first party. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988). In *Rainey*, spouses of deceased Navy pilots brought an action against the aircraft manufacturer and service company. The primary issue at trial was whether the crash was caused by pilot error or faulty equipment. Several months after the accident, the plaintiff, John Rainey, himself a Navy flight instructor, sent a letter to a Navy Lieutenant Morgan. He indicated he believed the most probable cause of the crash was "loss of useful power (rollback) caused by some form of pneumatic sensing/fuel flow malfunction...." *Id.* at 159, 109 S.Ct. at 444.

At trial, Rainey did not testify during the case in chief, but was called by the defense as an adverse witness. He was questioned about certain portions of the letter. However, on cross-examination, when counsel attempted to introduce the remainder of the letter concerning his belief about the cause of the crash, the trial court sustained a defense objection on the ground that the letter called for an opinion. Following a defense verdict and appeal, the eleventh circuit court of appeals reversed. The United States

Supreme Court affirmed in part and held that the district court had improperly restricted cross-examination of the plaintiff and "erred in refusing to permit Rainey to present a more complete picture of what he had written to Morgan." *Id.* at 170, 109 S.Ct. at 450. The Court commented that the jury was given a distorted and prejudicial impression of Rainey's letter, and that "Rainey's counsel was unable to counteract this prejudicial impression by presenting additional information about the letter on cross-examination." *Id.* at 171, 109 S.Ct. at 451. The Court stated:

> In proposing Rule 106, the Advisory Committee stressed that "it does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case." We take this to be a reaffirmation of the obvious: that when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant and therefore admissible under Rule 401 and 402.

Id. at 172, 109 S.Ct. at 451 (citations omitted). See also JOHN W. STRONG, MCCORMICK ON EVIDENCE § 56, at 228 (4th Ed.1992) (if first party introduces a part of a writing, adversary has a right to introduce remainder during his or her own next stage of presenting proof). The trial court therefore erred in excluding portions of the Zobel letter under Rule 106.

2. Violation of Confrontation Rights

[18] We also believe failure to permit defense counsel to cross-examine Adamson about the meaning of the excluded portions of the letter violated defendant's Sixth Amendment right to cross-examine witnesses. The state's purpose in reading selected portions of the Zobel letter was to rehabilitate Adamson. Adamson explained during redirect examination that the letter meant he would tell the truth at trial if the state offered him a deal. He suggested that inculpating his friends would be difficult for him. This testimony bolstered the state's position that, despite his immoral character, Adamson was credible. However, defendant was precluded from rebutting this inference by cross-examining Adamson on whether the letter may have also indicated he could be influenced to testify in a certain manner because of a financial motive.

[19][20][21][22] The right of confrontation, which includes the right to cross-examine witnesses, is a fundamental right. *Pointer v. Texas*, 380 U.S. 400, 403-04, 85 S.Ct. 1065, 1067-68, 13 L.Ed.2d 923 (1965); *State v. Correll*, 148 Ariz. 468, 473, 715 P.2d 721, 726 *533 (1986). Cross- examination may be restricted based on concerns for harassment, prejudice, confusion of the issues, safety of a witness, or marginal relevance. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). A

conviction may be reversed, however, if cross-examination has been unreasonably limited. *Dunlap*, 125 Ariz. at 105, 608 P.2d at 42. In particular, a defendant has the Sixth Amendment right to cross-examine a witness concerning his bias, motive, and prejudice. *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974); *State v. Gertz*, 186 Ariz. 38, 41-43, 918 P.2d 1056, 1059-61 (App.1995). Cross-examination for this purpose is especially important where the credibility of a key government witness is the central factor to be weighed by the trier of fact. *Davis*, 415 U.S. at 317, 94 S.Ct. at 1110-11.

[23] The term "bias" is a "shorthand reference to all forms of partiality that may be proven by extrinsic evidence" and includes interest, motive, and corruption. *In re C.B.N.*, 499 A.2d 1215, 1219 (D.C.App.1985). Corruption of a witness is defined as the "conscious false intent which is inferable from giving or taking a bribe or from expressions of a general unscrupulousness for the case in hand." 3A WIGMORE, EVIDENCE § 945, at 782 (Chadbourn rev.1970) (emphasis added). The "essential discrediting element is a willingness to obstruct the discovery of the truth by manufacturing or suppressing evidence." *Id.* at 803. Wigmore suggests that "[a] willingness to swear falsely is, beyond any question, admissible as negativing the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence." *Id.*;

see also In re C.B.N, 499 A.2d at 1219 (willingness to testify falsely goes to the core of the witness' credibility, regardless of his personal or pecuniary relationship with the defendant). Here, defendant was precluded from examining Adamson regarding a possible inference in the Zobel letter that Adamson might alter his testimony for money, whether to benefit himself or his wife. Although a fair reading of the letter as a whole suggests Adamson might choose not to implicate certain individuals for a price, rather than falsely accuse someone, such a suggestion nonetheless goes to the heart of his credibility. The trial court abused its discretion in limiting cross-examination on this point and violated defendant's rights of confrontation.

[24] However, violations of a defendant's confrontation rights may be harmless error. *Van Arsdall,* 475 U.S. at 681, 106 S.Ct. at 1436; *State v. Medina,* 178 Ariz. 570, 577, 875 P.2d 803, 810 (1994). Error is harmless if we can say beyond a reasonable doubt that the error did not affect the verdict. *Medina,* 178 Ariz. at 577, 875 P.2d at 810. "The inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993).

[25] Here, we find the error was harmless. We do not agree with defendant that the only inference the jury could glean from the letter is that Adamson was willing to alter his testimony for money. Indeed, an equally likely inference is that Adamson recognized his testimony must be truthful and only offered to change his inflection, mannerisms, and body language while testifying. Furthermore, defendant thoroughly attacked Adamson's credibility during the lengthy cross-examination. Adamson's testimony clearly was "for sale" in the sense that he used it to first escape the death penalty and then avoid lifetime incarceration after initially refusing to testify at defendant's second trial. As to his reputation for truthfulness, Adamson admitted giving several incorrect statements to state and federal investigators, and lying when it served his needs as a criminal. On many occasions, Adamson said that he was a murderer, burglar, drug dealer, and arsonist who had no qualms about placing a bomb under Bolles' car. Although the trial court improperly prevented defendant's use of the Zobel letter, we cannot see how this one possible inference could have attacked Adamson's credibility more thoroughly than was already accomplished. We are convinced beyond a reasonable doubt that the error only excluded cumulative evidence *534 and did not affect the verdict. *State v. Gallegos*, 178 Ariz. 1, 13, 870 P.2d 1097, 1109, *cert. denied*, --- U.S. ----, 115 S.Ct. 330, 130 L.Ed.2d 289

(1994); *see also State v. Jeffers*, 135 Ariz. 404, 423, 661 P.2d 1105, 1124, *cert. denied*, 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983).

D. The Admission of Hearsay Statements.

1. Rosalie Bolles

During cross-examination of police detective George Weisz, defense counsel asked about a 1976 police interview with Rosalie Bolles (the 1976 statement). Over the state's objection, the trial court admitted the report of the interview into evidence. In that interview, Mrs. Bolles said that prior to the bombing, her husband was investigating the Funk family and their connection to organized crime. She added that since the investigation began, they had received threatening phone calls.

During redirect examination, Weisz testified over a hearsay objection about an interview with Rosalie Bolles two weeks before Weisz testified (the 1993 statement). In that interview, Mrs. Bolles told Weisz that at the time of the bombing, her husband had been investigating Kemper Marley and Sam Steiger. She said that Emprise was always a subject of interest to him, but he was not working on the Emprise/Funk matter at that time.

Defendant claims the 1993 statement was inadmissible hearsay and its admission requires reversal. The state claims the

1993 statement was not hearsay and was admissible to rebut a false impression created by defendant that no follow-up investigation was done. The state also claims the evidence was admissible as impeachment evidence under Rule 806, Arizona Rules of Evidence. Finally, the state claims that because defendant was permitted to introduce inadmissible hearsay evidence in the 1976 statement, in the interests of fairness the state should be permitted to do so as well.

[26] Whether or not to admit evidence at trial is within the trial court's discretion. *State v. Robles*, 135 Ariz. 92, 94, 659 P.2d 645, 647 (1983). Nonetheless, we conclude Mrs. Bolles' 1993 statement offered by the state was inadmissible hearsay. Contrary to the state's argument that the evidence was used only to disprove defendant's claim the state did an inadequate follow-up investigation, the 1993 statement was offered to prove the truth of the matter asserted, i.e., that Bolles was investigating Kemper Marley at the time of his death. It defies logic to presume that a statement made in 1993 had some bearing on the investigators' decisions in 1976 so as to prove the adequacy of the 1976 investigation.

[27][28] Additionally, Mrs. Bolles' 1993 statement was not admissible under Rule 806, Arizona Rules of Evidence, to attack her credibility. That rule only applies when other hearsay statements (or certain 801(d)(2) exclusions) by the declarant have previously been admitted.

Because defendant elicited Mrs. Bolles' 1976 statement to show the inadequacy of the investigation, and did not offer it for the truth of the matter asserted, it was not hearsay. [FN2] See generally Ariz. R. Evid. 801(c). Under these circumstances, Mrs. Bolles' credibility was irrelevant to the issue whether investigators adequately followed-up information contained in their 1976 reports.

FN2. Note the state's brief, which reads, "Defense counsel proffered Rosalie Bolles' statement, not for the truth of the matter asserted, but to show that the State did no follow-up investigation."

Finally, we disagree with the state that, in the interest of fairness, it should have been permitted to introduce otherwise inadmissible hearsay to rebut the content of Mrs. Bolles' 1976 "hearsay." The state inexplicably relies on *AMERCO v. Shoen*, 184 Ariz. 150, 907 P.2d 536 (App.1995), to support its proposition. First, because the 1976 statement was not inadmissible hearsay, there is no merit to the argument that fairness dictates the admission of additional hearsay in the 1993 statement. Second, *AMERCO* does not advocate the fairness argument proffered by the state. While we disagree with the state's reading of *AMERCO*, we agree with that case's resolution. There, this court considered whether improper admission of hearsay earlier in the trial justified admission of other related inadmissible *535 hearsay later in the trial. The court did not find the admission was permissible under the rules of evidence. However, it found the error, if any, was harmless. The court stated, "We do not suggest that trial courts should balance a mistaken admission of hearsay by extending equal hearsay opportunity to the other side. But it is inconceivable in this case that the evidence in question affected the verdict." *Id.* at 164, 907 P.2d at 550.

[29] Here, the admission of Mrs. Bolles' 1993 statement, although erroneous, was not so prejudicial that a new trial is warranted. As in *AMERCO*, the evidence did not affect the verdict. The 1993 statement was merely cumulative to other evidence presented by the state on this point. For example, Bernie Winn, a political writer for the Arizona Republic in 1976, testified that Bolles was investigating a story about Kemper Marley at the time of his death. Adamson also testified that defendant wanted Bolles murdered first because of Bolles' soon-to-be-published writings about Kemper Marley. There was no reversible error.

2. Robison Diaries

Over defense objection, the state introduced into evidence certain entries from Robison's diary written on October 21, 1989, November 30, 1989, and March 18,

1990. The diary had been seized in Robison's prison cell pursuant to a warrant. The trial court ruled the entries were admissible as statements of a coconspirator of a party made during the course and in furtherance of the conspiracy.

[30] A statement is not hearsay and is admissible if "the statement is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Ariz. R. Evid. 801(d)(2)(E). A coconspirator's statements are admissible " 'when it has been shown that a conspiracy exists and the defendant and the declarant are parties to the conspiracy.' " *State v. White*, 168 Ariz. 500, 506, 815 P.2d 869, 875 (1991), *cert. denied*, 502 U.S. 1105, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992) (quoting *State v. Baumann*, 125 Ariz. 404, 411, 610 P.2d 38, 45 (1980)). Here, the state alleged there was a conspiracy between defendant and Robison to cover up their involvement in the Bolles murder and to obstruct the investigation and prosecution of the case.

[31][32]Defendant claims that the diary entries were not made in furtherance of the conspiracy and therefore are not admissible under this rule. When inquiring whether a statement of a coconspirator was made in furtherance of the conspiracy, courts focus on the intent of the coconspirator in advancing the goals of the conspiracy, not on whether the statement has the actual effect of

advancing those goals. *See United States v. Nazemian*, 948 F.2d 522, 529 (9th Cir.1991), *cert. denied*, 506 U.S. 835, 113 S.Ct. 107, 121 L.Ed.2d 65 (1992) (interpreting federal rule of evidence that is identical to Arizona rule). So long as some reasonable basis exists for concluding the statement furthered the conspiracy, the "in furtherance" requirement is satisfied. *Doerr*, 886 F.2d at 952. We will only reverse if the trial court abused its discretion in determining that statements of a coconspirator met the rule's requirements and were admissible. *See United States v. Jennell*, 749 F.2d 1302, 1307 (9th Cir.1984), *cert. denied*, 474 U.S. 837, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985); *State v. Stanley*, 156 Ariz. 492, 495, 753 P.2d 182, 185 (App.1988). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres v. North American Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App.1982).

[33] Here, we do not find an abuse of discretion. In one entry, Robison wrote, "[C]alled Diane [Fodor] this morning. She settled down over *535 yesterday. It's understandable to me why she's upset about the Bolles case, and I reassure her as best I can, but of course she does not know the complete story, and I cannot tell her." Later, he wrote, Severance is here. We expect a fight with the Attorney General's office. There is one motion Tom

does not have to waste time on. The only reason I can see for giving it to us, they are trying to divide it so it will look like Max will go free, then *536 they can get me to plea bargain. I see this as the only solid chance they have to conviction [sic]. It will never happen, but they do not know that.

The diary entries are admissible if they reveal an intent to advance the goals of the conspiracy, even if they do not actually advance those goals. To the extent Robison may have used these diary entries to help him formulate or carry out such conspiracy, they would be "in furtherance of the conspiracy." For example, the diary entries may have aided Robison by reminding him of what he had not, and could not, tell Fodor. The entries may also have enabled Robison to understand how trial maneuvers fit into a master plan and understand the relationship of the maneuvers to the conspiracy. Therefore, we cannot say the trial court exercised its discretion in a manifestly unreasonable manner, or on untenable grounds, when it admitted this evidence.

E. Was Harold Bone's Grand Jury Testimony Admissible?

[34] Harold Bone, a friend of defendant, testified as a character witness at defendant's first trial. In 1990, he testified before the grand jury in connection with the ongoing

investigation of this case. At the time of the grand jury proceeding, Bone was seventy-nine years old and admitted, "[M]y memory is not very good anymore." Bone died prior to defendant's second trial. Over defense objection, the court permitted the grand jury testimony to be read into evidence under Rule 804(b)(5), Arizona Rules of Evidence. Bone testified he formed a legal defense committee in 1977 to raise funds to pay legal fees to defendant's attorney, John Savoy, and to his knowledge the funds had not gone to either Robison or Bette Gleason. He also testified about an incident in late June of 1976 when his son was in the hospital recovering from serious burns. He said defendant visited his son in the hospital and while there told Bone about the stranger who came to defendant's door on June 10, 1976. Bone said defendant claimed the stranger gave him $5000 and asked defendant to take it to Neal Roberts because Roberts was in trouble. Defendant told Bone that he took the money to Roberts and that Adamson was there. This testimony in part confirmed defendant's assertion that a stranger gave him money to deliver. However, the testimony contradicted defendant's version of the facts about where the money was to be delivered. Defendant argues that the testimony lacked circumstantial guarantees of trustworthiness, was inadmissible under Rule 804(b)(5), and that its admission violated his confrontation rights under the Sixth Amendment. We disagree.

Rule 804(b)(5), Arizona Rules of Evidence, allows the statements of an unavailable witness to be admitted into evidence if they do not fit into another hearsay exception and have "equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

[35] A similar, although not identical standard, is applicable to determine whether the admission of a hearsay statement of an unavailable witness violates the Confrontation Clause of the Sixth Amendment. *See State v. Luzanilla*, 179 Ariz. 391, 394, 880 P.2d 611, 614 (1994), *cert. denied*, --- U.S. ----, 115 S.Ct. 1406, 131 L.Ed.2d 293 (1995); *State v. Valencia*, --- Ariz. ----, ----, 924 P.2d 497, 501 (App.1996). A statement not falling within a firmly rooted exception must have "particularized guarantees of trustworthiness." *Idaho v. Wright*, 497 U.S. 805, 815, 110 S.Ct. 3139, 3146, 111 L.Ed.2d 638 (1990). In determining whether such guarantees exist, courts look to "the totality of circumstances ... that surround the making of the statement and that render the

declarant particularly worthy of belief." *Id.* at 819, 110 S.Ct. at 3148. We find the testimony contained adequate guarantees of trustworthiness to satisfy the requirements of Rule 804(b)(5) and the Confrontation Clause.

*537 Many federal courts of appeals have considered the admissibility of grand jury testimony under the aforementioned requirements and determined that it is potentially admissible. E.g., *United States v. Donlon*, 909 F.2d 650, 654 (1st Cir.1990); *United States v. Marchini*, 797 F.2d 759, 763 (9th Cir.1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1288, 94 L.Ed.2d 145 (1987). Looking at the criteria for admissibility developed in those cases, we conclude the trial court properly determined that Bone's grand jury testimony had sufficient circumstantial guarantees of trustworthiness. Bone was under oath, testified to matters within his personal knowledge, never recanted his testimony, and had no motive to harm defendant by lying. See *Donlon*, 909 F.2d at 654. Bone's relationship with defendant was that of a close friend; Bone had no relationship with the government such as informant or agent. See *Marchini*, 797 F.2d at 763. Furthermore, Bone's testimony was proffered only as circumstantial evidence of defendant's guilt. Thus, the circumstantial guarantees of trustworthiness need not have been as strong as if the evidence was direct or critical proof of defendant's guilt. *Id.*;

United States v. Barlow, 693 F.2d 954, 962-63 (6th Cir.1982), *cert. denied,* 461 U.S. 945, 103 S.Ct. 2124, 77 L.Ed.2d 1304 (1983).

Admittedly, defendant did not have the opportunity to cross-examine Bone. Cross-examination provides the opportunity to arrive at the truth by bringing out such matters as the " 'witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, ...) the very fact that he has a bad memory.' " *State v. King,* 180 Ariz. 268, 276, 883 P.2d 1024, 1032 (1994), *cert. denied,* --- U.S. ----, 116 S.Ct. 215, 133 L.Ed.2d 146 (1995) (quoting *United States v. Owens,* 484 U.S. 554, 559, 108 S.Ct. 838, 842, 98 L.Ed.2d 951 (1988)). Here, though, Bone admitted several times in his testimony his memory was poor, he had difficulty remembering the details of the conversation because it occurred many years ago, and he was nearly eighty years old. Moreover, any bias would have been in defendant's favor as Bone was a friend who originally formed and managed defendant's legal defense fund. While cross-examination is of extraordinary importance in our adversarial system, we conclude that its absence did not vitiate all other circumstantial guarantees of trustworthiness. The trial court did not abuse its discretion in admitting this evidence. *King,* 180 Ariz. at 275, 883 P.2d at 1031 (admissibility of evidence within trial court's discretion).

[36] We concede the lack of evidence corroborating Bone's testimony weighs against its admissibility. *See Donlon*, 909 F.2d at 654; *Marchini*, 797 F.2d at 763; *Barlow,* 693 F.2d at 954. However, the presence of corroborating evidence is only one factor among several and it is not dispositive. Even if we concluded the trial court erroneously admitted Bone's testimony, such error was harmless. As mentioned above, the jury was well aware of the weaknesses in Bone's testimony, i.e., his failing memory. Furthermore, Bone's testimony may have bolstered defendant's theory of a stranger handing him money to deliver. Although Bone believed defendant was to give the money to Roberts and not Foster, Bone nevertheless provided additional evidence of defendant's "stranger" theory. Thus, even if the trial court improperly admitted the evidence, any error was harmless.

F. Improper Impeachment of Defense Witness Foglesong.

Marley Foglesong was defendant's next-door neighbor in 1976 and subsequently married one of defendant's daughters. He corroborated the "stranger" defense by testifying that on the morning of June 10, 1976, while he was on his way to work, he saw a man at defendant's door give defendant a brown paper bag. In 1980, Foglesong was convicted of vehicular manslaughter arising out of a drunk driving incident and was placed on probation for four years. Before Foglesong testified, the trial court ruled the conviction was not more than ten years old because of the probationary period and the state could impeach Foglesong with the prior conviction. However, the trial court directed the state not to inquire as to the circumstances surrounding the conviction or the punishment imposed. *See generally* Ariz. R. Evid. 609.

*538 During direct examination, Foglesong admitted he had been convicted of vehicular manslaughter. On cross-examination, the prosecutor asked, "Well, you were drink [sic], ran a red light and killed somebody?" Defendant objected and the objection was sustained. Defendant later moved for a mistrial. The court found the question improper but denied the motion.

[37] Defendant first argues the prior conviction was presumptively inadmissible under Rule 609(b), Arizona Rules of Evidence, because probation is not confinement and does not extend the time for measuring the ten-year period. We agree.

The court in *United States v. Daniel*, 957 F.2d 162, 168 (5th Cir.1992), held the ten-year period in Rule 609(b) is not calculated from the termination of probation. Before 1972, the federal rule, the source of the Arizona rule, used the expiration of the period of parole, probation, or sentence to calculate the ten-year period. However, an amendment to the rule specified that the calculation is from the release from confinement. *Id.*

Thus, the trial court erred when it determined Foglesong's conviction was less than ten-years-old and was admissible for impeachment because his probationary term ended in 1984. [FN3] However, the error is harmless if the verdict would not have been influenced by the admission of the prior conviction as impeachment evidence. *People v. Diaz,* 101 Ill.App.3d 903, 57 Ill.Dec. 273, 285, 428 N.E.2d 953, 965 (1981); see also *Ennis,* 142 Ariz. at 318, 689 P.2d at 577 (court examined whether, beyond a reasonable doubt, admission of a defendant's stale conviction for impeachment did not contribute significantly to the verdict).

FN3. The trial court did not make an on the record finding that the conviction's probative value substantially outweighed its prejudicial effects despite its age. Thus, the trial court did not satisfy the exception to the temporal limitation on the admissibility of prior convictions for impeachment in Rule 609(b). *See State v. Ennis,* 142 Ariz. 311, 317-18, 689 P.2d 570, 576-77 (App.1984).

[38] Here, we find beyond a reasonable doubt that Foglesong's prior conviction did not influence the verdict. The jury knew that Foglesong was defendant's son-in-law and may have been

biased in favor of defendant. Foglesong's testimony was inconsistent with defendant's account of the stranger's appearance as well; defendant told police the stranger was Mexican while Foglesong said the man was white. Foglesong's credibility was not significantly affected by the erroneous admission of his conviction. See *Diaz*, 57 Ill.Dec. at 285, 428 N.E.2d at 965 (defense witness' credibility not affected by improper admission of eighteen-year-old conviction because of inconsistencies in testimony). We conclude that, beyond a reasonable doubt, the error did not contribute significantly to the verdict.

[39][40] Once the trial court allowed the introduction of evidence of Foglesong's conviction, the prosecutor should not have compounded the problem by inquiring about the underlying facts of the conviction. *See State v. Tucker*, 157 Ariz. 433, 448, 759 P.2d 579, 594 (1988) (impeaching a witness under Arizona law with prior felony conviction is limited to showing the fact of the conviction, the name of the crime, the place, and the date). Contrary to the state's argument, defendant did not open the door to this improper inquiry by asking Foglesong in general terms about his prior conviction. Nonetheless, because the prejudicial effect was not great, we do not believe the trial court abused its discretion in denying the motion for mistrial on this ground. *State v. Bailey*, 160 Ariz. 277, 279, 772 P.2d 1130, 1132 (1989). The state

did not again refer to the details of Foglesong's conviction. Furthermore, the trial court sustained the objection to the state's question and instructed the jury to disregard any questions to which objections were sustained. Juries are presumed to follow their instructions. *Zafiro v. United States*, 506 U.S. 534, 540, 113 S.Ct. 933, 938-39, 122 L.Ed.2d 317 (1993); *see also State v. Schad*, 129 Ariz. 557, 568, 633 P.2d 366, 377, *cert. denied*, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982) (no presumption that juries will disobey instructions).

G. Was the Prosecutor's Closing Argument Improper?

Defendant claims the prosecutor engaged in improper vouching and presented personal opinion during closing argument.

*539 1. Vouching

[41][42] Prosecutorial vouching occurs either "(1) where the prosecutor places the prestige of the government behind its witness; (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989). The first type of vouching consists of personal assurances of a witness' truthfulness. The second type involves prosecutorial remarks that bolster a witness' credibility by reference to material outside the record.

State v. King, 180 Ariz. 268, 277, 883 P.2d 1024, 1033 (1994), *cert. denied*, --- U.S. ----, 116 S.Ct. 215, 133 L.Ed.2d 146 (1995). Because defendant did not object to the challenged comments, the issue is waived absent fundamental error. *State v. Roscoe*, 184 Ariz. 484, 497, 910 P.2d 635, 648 (1996).

[43] Here, while discussing Neal Roberts' role in the bombing, the prosecutor said,

> If Neal Roberts was actually involved in the planning, or if he had a motive, if he wanted to have Don Bolles killed, he was in on it with Max Dunlap, then perhaps we can try Neal Roberts sometime. That's not for you to really decide. You need to decide whether or not Max Dunlap did this; that's your primary purpose. When you go into that jury room, *you are not to worry about whether or not Neal Roberts was also involved, that's our job.*

Defendant contends this italicized language implied that the state had insider knowledge regarding Roberts' involvement and could still prosecute Roberts because of this insider knowledge. Thus, the jury would believe the state had other evidence not presented at trial that explained the state's failure to pursue Roberts at this time. Therefore, the jury would disregard defendant's theory that Roberts was behind the murder and had set up defendant. When read in context, however, the statement is not improper. The argument simply informed the jury that the state might still pursue Roberts if the evidence arises. It also focused the jury on their duty in this case, determining whether defendant was guilty. Moreover, the trial court similarly instructed the jury:

It is no defense to the crime charged against the defendant that another person or persons not now on trial might have participated or cooperated in the crime. You should not guess the reason for the absence from the courtroom of such other person or persons. The only matter before you is the guilt or innocence of Max Dunlap.

Although the italicized portion of the closing argument inartfully made this point, it did not constitute improper vouching. We cannot ascribe to it the sinister connotations that defendant does.

[44] Defendant also points to this language in the prosecutor's argument: After this case is over, after you have rendered a verdict, *if you want to talk to us about anything about the case, you can talk to us if you want to privately. We'd like to talk to you privately. We'd like to talk to you about credibility of witnesses.* If you don't want to talk to us, you simply say, you know, this is private. We will respect your privacy, we won't talk to you, it will be over with for you.

Defendant argues that the italicized portion implies that information outside the record bolsters the state witnesses' credibility.

First, we believe the statements, when read in context, indicate the prosecutors wanted to collect feedback from jurors regarding their presentation of the case--a common self-improvement technique among litigators. Indeed, the trial court told the jury the same thing when he twice indicated his availability to discuss the case after trial. Although the prosecutor could have selected his words more prudently, his statements were not improper when read in context.

[45] Even if the prosecutor was vouching, the conduct did not unfairly prejudice defendant or deny him the right to a fair trial. *State v. Dumaine*, 162 Ariz. 392, 403, 783 P.2d 1184, 1195 (1989) (to warrant reversal, prosecutor's comments in closing argument must be so egregious that defendant is denied a fair trial). Because the statements were subject to more than one interpretation, and were rather obscure, we find this case is *540 similar to others in which prosecutorial misconduct did not require reversal. *Cf. State v. White*, 115 Ariz. 199, 203-04, 564 P.2d 888, 892-93 (1977) (improper comment on credibility of state's witness did not require reversal); *State v. Islas*, 119 Ariz. 559, 561, 582 P.2d 649, 651 (App.1978) (prosecutor's statement that state would not waste time bringing a case if the investigating officer were not believed did not require reversal). Furthermore, the trial court twice instructed the jury that counsels'

arguments were not evidence, thus mitigating the effects of the statements.

2. Prosecutor's Personal Opinion

[46] Later in his argument, without objection, the prosecutor used his personal opinion to justify Adamson's efforts to obtain a better plea bargain after defendant's first trial. Discussing Adamson's demand for a better deal before testifying in defendant's second trial, the prosecutor said, "Instead of the prosecutor countering with another offer, which by the way sounds like what I would do...." He added, "John [Adamson] had a legitimate reason to renegotiate, or at least try to renegotiate his contract." Adamson "had a right to be upset a little bit. I am not saying we did it exactly right back in those days.... John Adamson was not completely at fault for the falling out between him and the Attorney General's office, but there was one." The prosecutor also told the jury that Adamson had no motive to lie for the state since he was no longer subject to the death penalty. To rebut this statement, during closing argument, defendant's counsel told the jury that in the absence of the plea agreement, Adamson would be in prison for life without possibility of parole, and he did have a motive to testify favorably for the state. Because defendant did not object, the issue is waived except for fundamental error.

[47] Much of the challenged comments simply are arguments that Adamson was telling the truth because he is no longer subject to the death penalty. Although the comments failed to mention Adamson's exposure to life imprisonment without the plea agreement, defense counsel's closing argument clarified any misunderstanding. However, the comments in part express the prosecutor's personal opinion that Adamson justifiably sought a better plea bargain. Argument containing personal opinion is improper because it is not based on the evidence or reasonable inferences that may be drawn from the evidence. *See State v. Bailey*, 132 Ariz. 472, 478, 647 P.2d 170, 176 (1982). Defendant believes the comments improperly bolstered Adamson's credibility by referring to material outside the record (the prosecutor's opinion). *See King*, 180 Ariz. at 277, 883 P.2d at 1033; *Vincent*, 159 Ariz. at 423, 768 P.2d at 155. While the comments referred to material outside the record, we think they negligibly bolstered his credibility, if at all. The comments did not, for example, hint that other evidence existed supporting or corroborating Adamson's testimony. Even if the comments had the potential to bolster Adamson's credibility, they did not unfairly prejudice defendant or deny him the right to a fair trial. The jury knew the Arizona Supreme Court found Adamson was bound by the original plea bargain and was not justified in his efforts to obtain a better deal, regardless of the

prosecutor's opinion. Also, as mentioned above, the trial court instructed the jury that the arguments were not evidence. The comments did not constitute fundamental error.

H. Refusal to Give *Willits* Instruction.

Although requested by defendant, the court refused to give a *Willits* instruction. See generally *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

[48] In order to be entitled to a *Willits* instruction, a defendant must prove (1) that the state failed to preserve material evidence that was accessible and which might tend to exonerate him and (2) that the failure resulted in prejudice to the defendant. *State v. Leslie*, 147 Ariz. 38, 47, 708 P.2d 719, 728 (1985). Absent an abuse of discretion, this court will not reverse a trial court's decision to forego a *Willits* instruction. *State v. Bolton*, 182 Ariz. 290, 308-09, 896 P.2d 830, 849-50 (1995). A trial court does not abuse its discretion when it denies a request for a *Willits* instruction where a defendant fails to establish that the lost evidence would have *541 had a tendency to exonerate him. *Bolton*, 182 Ariz. at 309, 896 P.2d 830; *State v. Atwood*, 171 Ariz. 576, 627, 832 P.2d 593, 644 (1992), *cert. denied*, 506 U.S. 1084, 113 S.Ct. 1058, 122 L.Ed.2d 364 (1993).

[49] Here, although the state failed to preserve evidence that was accessible to it, defendant has not shown the evidence would have tended to exonerate him or that he suffered actual prejudice as a result of the state's failure to preserve the evidence. The specific contents of the allegedly missing portion of the 76-86 file and the documents removed from the Emprise file are unknown. The information contained in the surveillance worksheets was transferred to the surveillance reports, and there is no evidence the worksheets contained exculpatory information. Defendant's claim that the destroyed or lost files would have supported his theory of the case entitling him to a Willits instruction is entirely speculative. The trial court did not abuse its discretion.

I. Were the Jury Verdicts Coerced?

On April 6, 1993, prior to deliberations, the judge gave the standard instruction to the jury that it had to reach unanimous verdicts. On April 14, 1993, the jurors notified the court they were deadlocked. The judge did not ask the jurors whether there was a reasonable possibility of reaching a verdict. Instead, over objection, the judge gave the jury a form of *Allen* [FN4] or "dynamite" charge, [FN5] telling the jurors they had not "deliberated nearly long enough." He asked the jurors if they were having difficulty with any instructions before sending them back to the jury room. None of the jurors indicated they had any difficulties, although the foreperson asked if there was an instruction to help them through their impasse. The trial court stated that it could only refer the jury to the instructions already given. Five days later, on April 19, 1993, the jurors advised the court that they had reached a verdict on count II but were deadlocked on count I. The trial court gave additional instructions designed to help the jury's deliberations.

FN4. *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

FN5. Such charge is a supplemental instruction the court gives to encourage a jury to reach a verdict after that jury has been unable to agree after some period of deliberation. *United States v. Nickell*, 883

[50][51] Defendant claims the court's actions in telling the jurors they had not deliberated long enough and giving the *Allen* charge after the jury was deadlocked requires reversal. The totality of circumstances must be considered in determining whether the defendant "received a fair trial at the hands of an independent jury, the members of which were free from intimidation or undue pressure." *State v. Lautzenheiser*, 180 Ariz. 7, 9, 881 P.2d 339, 341 (1994). The

court will find coerciveness if, under the totality of the circumstances, the trial court's actions or remarks displaced the independent judgment of the jurors. *State v. McCutcheon*, 150 Ariz. 317, 320, 723 P.2d 666, 669 (1986).

1. The April 14, 1993, *Allen* charge.

[52] As to the *Allen* charge of April 14, 1993, we do not find that it denied defendant a fair trial from an independent jury. Indeed, cases continue to acknowledge the propriety of the Allen charge. *E.g., United States v. Easter*, 66 F.3d 1018, 1023 (9th Cir.), *cert. denied*, --- U.S. ----, 116 S.Ct. 547, 133 L.Ed.2d 450 (1995); *United States v. Arbelaez*, 719 F.2d 1453, 1461 (9th Cir.1983), *cert. denied*, 467 U.S. 1255, 104 S.Ct. 3543, 82 L.Ed.2d 847 (1984). Here, as in *Easter*, the trial court did not know the numerical division of the jurors' votes or which way the jury was leaning. There was no reason for a juror to believe the *Allen* charge was aimed at him or her or at jurors inclined to vote one way or the other. *Easter*, 66 F.3d at 1023. The charge did not coerce the verdicts.

2. The April 19, 1993, supplemental instruction.

[53] Defendant argues this language in the trial court's supplemental jury instruction of April 19, 1993, was

particularly harmful: "It is desirable if you reasonably can agree upon a verdict. *For the parties involved in *542 the case it is an important one, and there is no reason to believe that the case could ever be submitted to a jury more competent to decide it* " (emphasis added). Admittedly, our supreme court twice disapproved of this instruction. *State v. Glover*, 159 Ariz. 291, 294-95, 767 P.2d 12, 15-16 (1988); *State v. Smith*, 108 Ariz. 121, 124, 493 P.2d 904, 907 (1972).

[FN6] The *Glover* court reversed on other grounds. The *Smith* court disapproved of the language but found it was not a ground for reversal under the circumstances. Thus, while disapproving of the language, the supreme court has never reversed a conviction because of it. [FN7] Furthermore, the supreme court has not specified what particular language in the instruction is objectionable. The only indication as to why the instruction is proscribed is "the instruction might tend to impermissibly pressure jurors to reach a verdict." *Glover*, 159 Ariz. at 295, 767 P.2d at 16.

FN6. The instruction in *Smith* was a modified version of the so-called "Voeckell" instruction. *State v. Voeckell*, 69 Ariz. 145, 148, 210 P.2d 972, 974 (1949).

FN7. In *State v. Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959), the court reversed when similar instructions were given. There, the jury received the instructions at midnight and continued deliberating until 2:30 a.m. The instructions also instructed dissenting or minority jurors to reconsider the correctness of their positions. The dissimilarities from the case at hand are overwhelming.

Here, we do not find the instruction impermissibly pressured the jurors to reach a verdict. In *United States v. Miranda*, 986 F.2d 1283 (9th Cir.1993), *cert. denied*, 508 U.S. 929, 113 S.Ct. 2393, 124 L.Ed.2d 295 (1993), the trial court gave this instruction when the jury indicated it was evenly split on two counts:

This case has taken a great deal of time and effort to prepare and try. There is no reason to think it could be better tried or that another jury is better qualified to decide it. Thus, it is important that you reach a verdict if you can do so conscientiously. *Id.* at 1286. Four hours later, that jury returned the verdicts. Affirming the convictions, the court of appeals noted it had upheld analogous instructions and the circumstances of the case demonstrated no coercive effect on the jury. *Id.* Similarly, the circumstances here demonstrate no coercive effect on the jury. The trial court implored the jurors to maintain their independent judgment:

> This instruction is offered to help your deliberations, not to force you to reach a verdict. * * * I do not wish nor intend to force a verdict, I am merely trying to be responsive to your apparent need for help. * * * Each juror has a duty to consult with one another, to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment. * * * No juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of other jurors or for the purpose of returning a verdict. * * * I would ask that you return to the jury room, keeping in mind what I told you about trying to resolve any disagreement among yourselves without doing violence to your conscience....

These additional instructions made it clear that the trial court was not pressuring the jurors to sacrifice their convictions to reach a verdict. Furthermore, the trial court did not know the numerical division of the jurors' votes or whether the jury favored a particular verdict. Thus, no particular juror would have believed the instructions were aimed at him or her. See *Easter*, 66 F.3d at 1023. While the trial court should not have used the instruction, it did not impermissibly pressure jurors to reach a verdict or deny defendant a fair trial by an independent jury.

J. Did the Trial Court Properly Deny the Motion to Vacate Judgment?

[54] Defendant filed a motion to vacate judgment on the ground of newly-discovered evidence. See generally Ariz. R.Crim. P. 24.2(a)(2). He argued, among other things, that the testimony of co-defendant Robison at Robison's second trial constituted newlydiscovered evidence. Robison had asserted his constitutional privileges and was unavailable to testify at defendant's trial. Defendant *543 contends that Robison's testimony would have affected the outcome of that trial. Robison testified about gifts defendant had given him in prison and testified that defendant had not offered the gifts to obtain his silence. He also testified about conversations he had with Adamson regarding who was responsible for the bombing and testified that defendant was not involved.

A motion to vacate judgment under Rule 24.2(a)(2) on the ground of newly-discovered evidence is evaluated under the standards of Rule 32.1, Arizona Rules of Criminal Procedure. There are five requirements to obtain relief under Rule 32.1(e): (1) it must appear from the motion that the evidence relied on was discovered after trial; (2) the motion must allege facts from which the court can infer due diligence; (3) the evidence relied upon must not be merely cumulative or impeaching; (4) the evidence must be material to the issue involved; and (5) it must be evidence that would probably change the verdict if a new trial were ordered. *State v. Mauro*, 159 Ariz. 186, 207, 766 P.2d 59, 80 (1988). Absent an abuse of discretion, this court will not disturb a trial court's determination that a new trial for newly-discovered evidence is not necessary. *State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110, *cert. denied*, 502 U.S. 875, 112 S.Ct. 214, 116 L.Ed.2d 172 (1991).

The central question is whether the admission of the "new" evidence would have changed the outcome of defendant's trial. See *State v. Fisher*, 176 Ariz. 69, 75, 859 P.2d 179, 185 (1993); *State v. Morrow*, 111 Ariz. 268, 270, 528 P.2d 612, 614 (1974). A motion for new trial is properly denied if the testimony of a proffered witness does not appear reliable or credible to the trial court. *Jeffers*, 135 Ariz. at 426, 661 P.2d at 1127; *State v. Mason*, 105 Ariz. 466, 468, 466 P.2d 760, 762 (1970) (trial court did not abuse discretion in denying motion for new trial where court found asserted new witness was not credible and his testimony would not likely influence jury on a retrial).

Here, the trial court denied the motion because it found Robison was not credible. Robison had admitted at his trial that he had lied under oath on other occasions and "would have no hesitation in testifying to whatever he felt was expedient." The trial court concluded that the introduction of this testimony at a new trial would not have changed the verdicts. The trial court did not abuse its discretion in reaching this conclusion and denying the motion.

Moreover, we conclude Robison's testimony was not "newly-discovered." Federal courts overwhelmingly do not consider evidence newly-discovered when a defendant who voluntarily chose not to testify comes forward later to offer testimony exculpating a co-defendant. *United States v. Dale,* 991 F.2d 819, 838-39 (D.C.Cir.), *cert. denied,* 510 U.S. 906, 114 S.Ct. 286, 126 L.Ed.2d 236 (1993); *United States v. Reyes-Alvarado,* 963 F.2d 1184, 1188 (9th Cir.), *cert. denied,* 506 U.S. 890, 113 S.Ct. 258, 121 L.Ed.2d 189 (1992); *United States v. Lockett,* 919 F.2d 585, 591 (9th Cir.1990). Furthermore, a new witness who chose not to testify based on an attorney's advice was not prevented from testifying for purposes of the newly-discovered evidence requirement. *Reyes-Alvarado,* 963 F.2d at 1188. Although Robison's testimony may be considered "newly-available," we agree with the federal view that such evidence is not newly-discovered and is not sufficient to vacate the judgment. The trial court did not err when it denied this motion.

CONCLUSION

For the foregoing reasons, we affirm defendant's convictions and sentences. WEISBERG, P.J., and GRANT, J., concur.
(Cite as: 532 F.Supp. 183 (1981)

Max Anderson Dunlap, Plaintiff
v.
Robert K. Corbin, the Arizona Attorney General, Defendant
No. CIV 80-599 PHX CAM.
United States District Court,
D. Arizona.
Jan. 6, 1981.

Following dismissal of prosecution charging him with capital murder, former defendant filed complaint claiming that state attorney general's failure to provide him with a prompt trial on the formerly pending murder charge was violative of the Sixth Amendment right to a speedy trial. The District Court, Muecke, Chief Judge, held that: (1) abstention doctrine did not mandate dismissal of complaint by former defendant, because there were currently no ongoing state proceedings; (2) former defendant was not an accused who could claim the right to speedy trial, and therefore defendant's Sixth Amendment right to speedy trial was not violated because the state would not provide him with a prompt trial; and (3) District Court was without power to issue writ of mandamus directing a state agency to exercise its discretionary power so as to provide former defendant with a state trial.

Complaint dismissed.

Judgment affirmed, 9 Cir., 673 F.2d 1337.

1. Declaratory Judgment - 84

Without even a state charge pending, the federal courts may give declaratory and injunctive relief where the usual equitable tests are satisfied.

2. Federal Courts - 50

Abstention doctrine did not mandate dismissal of complaint by former criminal defendant that state attorney general's failure to provide him with a prompt trial on a formerly pending murder charge was violative of the Sixth Amendment right to speedy trial, because there were currently no ongoing state proceedings. U.S.C.A. Const.Amend. 6.

3. Criminal Law - 577.9

Where prosecution for capital murder was dismissed without prejudice following reversal of defendant's prior conviction, that former defendant was not an accused who could claim the right to a speedy trial, and therefore former defendant's Sixth Amendment right to speedy trial was not violated because the state would not provide him with a prompt trial. U.S.C.A. Const.Amend. 6.

4. Mandamus - 73(1)

District court was without power to issue writ of mandamus directing a state agency to exercise its discretionary power so as to provide defendant with a state trial.

Jordan Green, P.C., Phoenix, Ariz, for plaintiff.

Stanley Patchell, Diane E. Ramsey, Asst. Atty. Gen., Phoenix, Ariz, for defendant.

OPINION AND ORDER

MUECKE, Chief Judge

Max Anderson Dunlap, the plaintiff, has filed a complaint complaining that the defendant's failure to provide him with a prompt trial on a formerly pending murder charge is violative of his sixth amendment right to a speedy trial.

The defendant, Robert Corbin, the Arizona Attorney General, has filed a Motion to Dismiss, alleging that the complaint fails to state a claim.

This action is commenced pursuant to Section 1983 of the Civil Rights Act, 42 U.S.C. §1983. This Court has jurisdiction pursuant to 28 U.S.C. §1343(4). As there are no material facts in issue summary disposition of the matter is appropriate. *See* F.R.Civ.P., Rule 12(b).

Essentially, the question presented is whether the sixth amendment affords a person who has been charged, convicted and had the conviction reversed, a right to a speedy trial, where the charges are dismissed without prejudice following the reversal. A dismissal without prejudice in this case, allows the state the absolute discretion to refile the murder charge at any time.

FACTS

On June 13, 1976, a bomb destroyed an automobile being driven by Don Bolles. Bolles, an investigative reporter for the Arizona Republic, a local daily newspaper, was on his way to an interview relating to a story he was preparing. The reporter gravely wounded, died eleven days later. The murder received attention throughout the country and resulted in the formation of a nationwide commission of newspaper people whose stated objective was to continue Bolles' work of unmasking corruption in the Phoenix area. The murder and consequent events received extensive publicity, not only from the press, but also in the electronic media.

On January 15, 1977, three persons were arrested for this murder. One of the three, John Harvey Adamson, turned state's evidence. On his testimony, Dunlap and the third were convicted of first degree murder and sentenced to die in the gas chamber. Incarcerated since his arrest, Dunlap had spent over 40 months in custody and over 2 years on death row, when his conviction was overturned by the Arizona Supreme Court.

The day after the mandate issued reversing his conviction, Dunlap filed a motion for an expedited trial date. Having maintained his innocence from the beginning, Dunlap sought a prompt trial by which he said he sought to vindicate and relieve himself, his family and friends from the notoriety and public obloquy of which he had been the subject. The motion was granted and an early trial date set.

Some three weeks before trial, the state's star witness, Adamson, informed the Attorney General's office that he would not testify in the new trial without a renegotiation of his plea agreement. The state, over Dunlap's objection, received a continuance of the trial date. Dunlap took a special action to the Supreme court contesting the granting of the continuance, but this action was denied.

Negotiations between Adamson and the prosecutor's office continued without success. Minutes before Dunlap's continued trial was to commence, the state obtained a dismissal of the prosecution without prejudice. The dismissal without prejudice, granted over Dunlap's objection, effectively provided the state with an unrestrained continuance.

Dunlap timely sought review of the dismissal by again taking a special action to the Arizona Supreme Court. That court declined to take jurisdiction of the petition, leaving the federal courts as his only remaining alternative for relief.

FEDERAL ABSTENTION

[1,2] In the Motion to Dismiss, the Attorney General suggests that Dunlap's request for relief should be denied on the grounds that federal intervention would offend the abstention doctrine articulated in *Younger v. Harris*, 401 U.S. 37, 91

S.Ct. 746, 27 L.Ed.2d 669 (1971). *Younger* stands for the proposition that state courts are fully competent to adjudicate constitutional questions. Therefore, a federal court should generally refuse to interfere with an ongoing state criminal proceeding.

As the defendant has been quick to point out, however, there are currently no ongoing state proceedings. Without even a state charge pending, the federal courts may give declaratory and injunctive relief where the usual equitable tests are satisfied. *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Doran v. Salem Inn Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). In this case then, this Court is not bound by *Younger* abstention considerations.

PLAINTIFF'S RIGHT TO A SPEEDY TRIAL

[3] Dunlap also claims that his sixth amendment right to a speedy trial has been violated because the state will not provide him with a prompt trial. The State Attorney General's posits that Dunlap has no charges pending against him and therefore does not have a right to a speedy trial. Dunlap's argument that he does have such a right is three-fold: (1) that the case is factually similar to *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), where the United States Supreme Court recognized such a right and granted relief accordingly; (2) that the reasons and

justifications for having such a right to a speedy trial are present here; and (3) that after being once charged, the right to a speedy trial does not disengage upon the subsequent dismissal of the charge.

In *Klopfer*, the state court defendant was charged by indictment and promptly tried, the trial resulting in a mistrial. Subsequently, the state sought and obtained a *nolle prosequi*, a procedural device which had the effect of tolling the statute of limitations while providing the state with an unrestrained continuance. *Klopfer* alleged that this violated his right to a speedy trial, and like the plaintiff here, he sought to be provided with a trial. The supreme Court agreed with *Klopfer's* contentions finding the *nolle prosequi* violative of his right to a speedy trial.

The factual similarities between *Klopfer* and Dunlap are striking. Both were publicly charged with a crime. Both had one trial, although one ended in a mistrial and the other ended in a reversible conviction. Both were subsequently released without restriction on travel and without bail. In both cases the statute of limitations could have no effect on limiting the prosecutions. In this case, the charge is a capital offense where there is no statute of limitations, while in *Klopfer*, the *nolle prosequi* tolled the statute. In both cases the prosecution was given the sole opportunity to determine when to prosecute.

Dunlap notes that there are several distinctions between the cases, the effect of which renders his case even more egregious. The *Klopfer* court refers to the public obloquy accompanying charges of criminality. Dunlap has been the subject of enormous publicity throughout the case. While Klopfer suffered some pretrial incarceration, Dunlap was incarcerated for over 40 months, 2 years of which were spend on death row.

The state would argue that the dispositive difference between the cases is that in *Klopfer*, the state court defendant was charged with a crime, and the charge was pending, while presently Dunlap has no such charge leveled against him, charges having been dismissed. It is on this ground that the state wishes the court to deny the relief requested.

The plaintiff's position is that while there is a legal distinction, the consequence to him is absolutely no different, and that the prejudice and public obloquy resulting from his inability to go to trial is far more severe than in the case in which the Supreme Court found a constitutional violation.

The second argument advanced by Dunlap is that the facts at bar satisfy the requisites established for determining speedy trial relief. The Supreme Court has recognized that the right to a speedy trial is an important safeguard in preventing undue and oppressive incarceration prior to trial, in minimizing anxiety and concern accompanying public accusation, and in limiting the possibilities that a long delay will impair the ability of an accused to defend himself. *United States v. Ewell*, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966).

Although the plaintiff herein is released without bond or restrictions on his liberty, he has spent over three years in prison and faces the possibility that he will one day be returned to incarceration. The crime of which Dunlap has been accused is especially notorious. He has maintained his innocence throughout the proceedings, yet was convicted on the testimony of John Harvey Adamson, who has subsequently been found guilty of first degree murder for the same crime. Dunlap's conviction was reversed because of joinder with another defendant and because of his inability to fully cross-examine his chief accuser, Adamson.

Dunlap does not allege that his case has been prejudiced to date by the continuances. He asserts that the relief sought, a trial within a reasonable time, is prophylactic so that there will not be any prejudice.

The State's justification for not providing a prompt trial has been the unavailability of its key witness, due to a breakdown in plea negotiations. Dunlap characterizes this as a dispute over the "price" for which Adamson will testify.

The Attorney General's reluctance to prosecute may alternatively be considered in terms of prosecutorial discretion. In these terms, the State's position is understandable, even compelling. *See United States v. Lovasco*, 431 U.S. 3783, 791-96, 97 S.Ct. 2044, 2049-52, 52 L.Ed.2d 752 (1977). The *Lovasco* court noted that prosecutors are under no duty to file charges as soon as probable cause exists but only when they are satisified that they will be able to establish a suspect's guilt beyond a reasonable doubt. While the inconveniences Dunlap faces due to his inability to quickly proceed to trial may not be insubstantial, full consideration must be given to the broad discretion invested in a prosecutor regarding when a charge is filed and a case commenced. Forcing a prosecutor to prematurely proceed to trial is not in the best interest of the parties, the public or the courts. *Id.* at 792, 97 S.Ct. at 2050.

Dunlap finally asserts that an analysis of United States Supreme Court case law supports his contention that he is entitled to relief. *Klopfer*, besides extending the right to a speedy trial to state proceedings, provides that the right can be affirmatively invoked resulting in a state being compelled to provide a prompt trial. *See also Smith v. Hooey*, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); *Braden v. Kentucky*, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973). Dunlap also cites several cases which recognize, either explicity or implicitly, that when charges are filed, dismissed and refiled, that the period during which the case has been dismissed may be included for consideration in determining whether a speedy trial right has been impinged. *See Dillingham v. United States*, 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975); *United States v. Ewell*, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966). From these cases Dunlap concludes that he is entitled to affirmative relief based upon the prophylactic characteristics of the sixth amendment, notwithstanding the absence of a pending charge.

Dunlap's analysis of the law ignores the importance of *Arnold v. McCarthy*, 566 F.2d 1377, 1383 (9th Cir. 1978), which held that when a charge is dismissed without prejudice, the defendant is not an accused and cannot demand a speedy trial. Despite his attempts to distinguish *Arnold*, this Court cannot escape the plain application of the case--without pending charges, Dunlap cannot demand a speedy trial.

It must additionally be noted, that the speedy trial rights asserted in the cases cited by Dunlap were not raised until charges had been reinstated against the defendants therein. In this case Dunlap is making such assertion prior to the reinduction of the charge. This action is premature. *See United States v. MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978). Should the state again charge Dunlap with murder, he could at that time assert the points raised by this suit.

Arnold further indicates that any contention of prejudice between a dismissal and second trial is to be tested, not under the sixth amendment's right to a speedy trial, but under general requirements of due process. 566 F.2d at 1383. Dunlap has asserted that the delay in this case has deprived him of due process. This fifth amendment standard was discussed in *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). As here, that case involved a substantial delay between the defendant's arrest and trial. The government in *Lovasco* relied on its broad prosecutorial discretion as justification for the delay. A comparison of the facts at bar with those presented in *Lovasco*, when coupled with the fact that Dunlap has not alleged actual prejudice to his case resulting from delay, require a finding that due process has not been offended.

JURISDICTION OF COURT TO GRANT RELIEF REQUESTED

(4) With his complaint, Dunlap seeks a federal court order directing a state agency to exercise its discretionary power so as to provide him with a state trial. The plaintiff is essentially seeking mandamus relief. The Attorney General defends on the ground that this Court does not have jurisdiction to issue mandamus relief compelling a state official to engage in discretionary action.

The argument relies on the case of *Clark v. State of Washington*, 366 F.2d 678 (9th Cir. 1966), which held that prosecuting attorneys, as quasi-judicial officers, enjoy immunity from suit under the Civil Rights Act insofar as prosecuting functions are concerned. The opinion further holds that federal courts are without power to issue writs of mandamus to direct state courts or their judicial officers in the performance of their duties. *Id.* at 681. Therefore, this Court is restrained by the *Clark* decision from issuing the type of relief sought by Dunlap.

CONCLUSION AND ORDER

In summary, this Court finds and concludes: that a defendant against whom charges have been dismissed without prejudice does not have a right to demand a speedy trial; that the state's justification for delay, the Attorney General's exercise of prosecutorial discretion, is compelling; that without an allegation of specific prejudice to his case, which more properly ought to be raised if a new charge is filed, the failure of the state to provide Dunlap with a trial does not offend notions of due process; and, that this Court may not properly award plaintiff the relief requested. Accordingly, IT IS ORDERED that Dunlap's complaint, seeking a directive compelling the Arizona Attorney General to immediately prosecute him, is dismissed.

(Cite as: 125 Ariz. 104, 608 P.2d 41)

STATE of Arizona, Appellee,
v.
Max Anderson DUNLAP, Appellant.
No. 4128.
Supreme Court of Arizona, In Banc.
Feb. 25, 1980.
Rehearing Denied March 18, 1980.

Defendant was convicted in the Superior Court, Maricopa County, Cause No. CR-96127, Howard F. Thompson, J., of first-degree murder and first-degree conspiracy, and defendant appealed. The Supreme Court, Gordon, J., held that preclusion of several questions during cross-examination resulting from witness' invocation of Fifth Amendment rights denied defendant his right to confrontation and constituted reversible error where precluded line of questioning involved subject matter either testified to on direct examination or potentially demonstrative of untruthfulness with respect to specific events of crime charged.

Reversed and remanded.

[1] CRIMINAL LAW - 662.1

Primary interest secured by Sixth Amendment right of an accused to confront witnesses against him is right of cross-examination. U.S.C.A.Const. Amend. 6.

[2] WITNESSES - 268(1)

Although trial court has discretion in deciding questions of scope of cross-examination, broad scope of cross-examination is allowed in order to comport with right of accused to confront witnesses against him. U.S.C.A.Const. Amend. 6.

[3] CRIMINAL LAW - 1170.5(5)

Since right of accused to confront witnesses against him is guaranteed by Constitution, conviction will be reversed if cross-examination has been unreasonably limited. U.S.C.A.Const. Amend. 6.

[4] CRIMINAL LAW - 1170.5(5)

As respects, Sixth Amendment right of confrontation, reversal of conviction is not necessitated by every limitation of cross-examination. U.S.C.A.Const. Amend. 6.

[5] WITNESSES - 309

Not every invocation of Fifth Amendment requires striking of witness's testimony or part thereof in criminal prosecution. U.S.C.A.Const. Amend. 5.

[6] CRIMINAL LAW - 696(3)

Precluded inquiry into collateral matters or cumulative matters involving general credibility does not necessitate striking of witness' testimony in criminal prosecution. U.S.C.A.Const. Amend. 6.

[7] WITNESSES - 284

Refusal of witness to respond to inquiry into matters elicited by state on direct examination requires striking of witness' direct testimony in whole or in part. U.S.C.A.Const. Amend. 6.

[8] WITNESSES - 284

Refusal of witness to respond to inquiry into matters tending to establish untruthfulness with respect to specific events of crime charged requires striking of witness' direct testimony in whole or in part. U.S.C.A.Const. Amend. 6.

[9] CRIMINAL LAW - 662.6 and 1170.5

In first-degree murder and first-degree conspiracy prosecution, preclusion of several questions resulting from witness' invocation of Fifth Amendment rights denied defendant his right to confrontation and constituted reversible error where precluded line of questioning involved subject matter either testified to on direct examination or potentially demonstrative of untruthfulness with respect to specific events of crime charged. U.S.C.A.Const. Amends. 5, 6.

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GORDON, Justice:

Defendant Max Anderson Dunlap appeals his convictions and sentences for first degree murder and first degree conspiracy. Having jurisdiction pursuant to A.R.S. § 13-4031, we reverse the judgments and sentences of the Superior Court.

On June 2, 1976, a bomb exploded in a car owned and occupied by Phoenix investigative reporter Don Bolles, which resulted in his death eleven days later. Bolles, still conscious and lucid at the scene of the explosion, told bystanders that John Harvey Adamson was involved in the bombing. Adamson was subsequently charged with Bolles' murder. As a result of a plea agreement with the State of Arizona, Adamson agreed to testify on behalf of the state against Dunlap and James Albert Robison who were then charged with murder and conspiracy.

Dunlap was jointly tried with Robison. At trial, Adamson testified that Dunlap had hired him to murder three people, Don Bolles, Al Lizanetz and Bruce Babbitt, then Attorney General, because all three were troublesome to Dunlap's friend and mentor, Kemper Marley. Bolles was selected as the first victim. Adamson further testified that Robison had agreed to assist him in the murder and had detonated the bomb with a remote control device after Adamson had placed the bomb under Bolles' car.

Both Dunlap and Robison were convicted and sentenced to a 29-30 year prison term on the conspiracy count and to death in the gas chamber on the murder count. In separate appeals, Dunlap and Robison challenge their convictions and sentences on a number of grounds. We find one of the issues raised by Dunlap dispositive of his appeal.

Adamson was the state's principal witness against the defendant, and his testimony was central to the state's case. He was cross-examined extensively by defense counsel. During cross-examination, the court sustained certain state objections, and Adamson invoked his Fifth Amendment right against self-incrimination several times. These limitations on cross-examination prompted the defendant to claim a violation of the confrontation right afforded by the Sixth and Fourteenth Amendments. Moreover, he moved that Adamson's direct testimony be stricken, because of his refusal to fully respond to cross-examination. This motion was denied, and Dunlap renews this challenge on appeal.

[1][2][3] The Sixth Amendment right of an accused to confront the witnesses against him is a fundamental right made obligatory on the states by the Fourteenth Amendment. *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). A primary interest secured by the clause is the right of cross-examination.

Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). Although the trial court has discretion in deciding questions of the scope of cross-examination, the policy in this state has always been to allow a broad scope of cross-examination in order to comport with the confrontation right. *State v. Morales*, 120 Ariz. 517, 587 P.2d 236 (1978); *State v. Ramos*, 108 Ariz. 36, 492 P.2d 697 (1972); *State v. Holden*, 88 Ariz. 43, 352 P.2d 705 (1960). Since the right is guaranteed by the Constitution, a conviction will be reversed if cross-examination has been unreasonably limited. *United States v. Norman*, 402 F.2d 73 (9th Cir. 1968), *cert. denied*, 397 U.S. 938, 90 S.Ct. 949, 25 L.Ed.2d 119 (1970). See, e.g., *State v. Morales, supra*; *State v. Briley*, 106 Ariz. 397, 476 P.2d 852 (1970).

[4][5][6][7][8] Reversal, however, is not necessitated by every limitation of cross-examination. *See, e. g., State v. Thompson*, 108 Ariz. 500, 502 P.2d 1319 (1972). Similarly, not every invocation of the Fifth Amendment requires the striking of a witness' testimony or a part thereof. *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963), *cert. denied*, 375 U.S. 822, 84 S.Ct. 60, 11 L.Ed.2d 55. In determining whether a witness' refusal to answer impinges upon a defendant's Sixth Amendment right, courts look to several factors. Precluded inquiry into collateral matters or cumulative matters involving

general credibility does not necessitate the striking of a witness' testimony. *United States v. LaRiche*, 549 F.2d 1088 (6th Cir. 1977), *cert. denied*, 430 U.S. 987, 97 S.Ct. 1687, 52 L.Ed.2d 383; *United States v. Gould*, 536 F.2d 216 (8th Cir. 1976); *United States v. Cardillo, supra*. Two types of precluded inquiry do, however, require the striking of a witness' direct testimony in whole or in part.[FN1] One is the refusal of a witness to respond to inquiry into matters elicited by the state on direct examination. *United States v. Gould, supra; United States v. Cardillo, supra; see United States v. Norman, supra*. The other is the refusal of a witness to respond to inquiry into matters tending to establish untruthfulness with respect to specific events of the crime charged. *United States v. LaRiche, supra; United States v. Cardillo, supra*.

FN1. We need not decide the question whether Adamson's direct testimony should have been stricken in whole or stricken in part, since neither was accomplished. Should the need for such a judgment arise again, it is best left to the trial court's discretion. As the Court opined in *United States v. Cardillo, supra* : "(W)hether all or a part of the testimony should be stricken, must depend upon the discretion of the trial judge exercised in the light of the particular circumstances. Unsatisfactory as such a generality is for a trial judge who is required to give instantaneous rulings on close questions and who does not enjoy the luxury of reflective appellate deliberation, any set of specific dogmas would be even more unworkable." 316 F.2d 606 at 613.

[9] The state claims that the foreclosed inquiry involved merely collateral matters, justifying the trial court's refusal to strike Adamson's direct testimony. We do not agree. Examination of the transcript of Adamson's testimony leads us to conclude that the preclusion of several questions operated to deny defendant his right to confrontation.

On direct examination, Adamson testified that he first discussed the proposed murders with Dunlap at a time when he went to fit a man named Don Aldridge for clothing. On cross-examination, he admitted that he had no license to do business in the retail selling of clothes, but invoked the Fifth Amendment when asked about the source of supply of the clothing. In the same vein, when Adamson was asked whether he had been engaged in the business of receiving stolen goods during the relevant time frame, the court sustained the state's objection on the basis of materiality and relevance.

Additionally, Adamson testified that he had $8,000 under his control when he discussed legal fees for his potential defense in the Bolles murder with a lawyer after the murder. He stated that just under $6,000 was from Max Dunlap, but again claimed his Fifth Amendment right when asked to divulge the source of the remaining $2,000. Similarly, the defense could not question him regarding the source of his income for 1976, because he also refused to answer the question whether he had filed a federal or state income tax return for that year.

In *United States v. Cardillo, supra,* the Second Circuit Court of Appeals reversed a trial court for failure to strike the testimony of a witness in a situation similar to the instant one. The witness, whose testimony was critical, had refused to divulge the source of money he allegedly lent to the defendant to finance the purchase of the stolen goods involved in the case. The state claimed that the proposed cross-examination related merely to credibility. The Court held, however, that it did not involve the type of testimony that would have developed the general unsavory character of the witness, as might questions involving prior convictions. The questioning might have led to the demonstration of untruthfulness with respect to specific events of the crime charged.

We consider this reasoning applicable to Adamson's foreclosed testimony. The line of questioning concerning the source of clothing and the business of stolen goods might have led to evidence that there was no such source, or that there was none at the critical time. If so, Adamson's testimony as to his meeting with

Dunlap at which the murder was first discussed would have been discredited. As the Court stated in *Cardillo, supra*, at 612-613: "Disclosure of a direct lie relating to the events testified to might have had far more influence on the court's ultimate decision than testimony merely establishing the unsavory character of the witness by admissions of prior crimes."

Had defense counsel been able to delve into the sources of the $2,000, he might have uncovered ties with individuals who the defense claimed were responsible for the murder. For example, Dunlap admitted delivering the $6,000 to Adamson, but claimed he did so as a favor to Phoenix attorney Neal Roberts. If Adamson had testified that Roberts had given him the $2,000, Dunlap's testimony would have been bolstered. Additionally, the above discussed inquiry involving the source of clothing and the business of stolen goods might also have led to disclosure of the sources of Adamson's funding.[FN2]

FN2. We speculate as to the role that answers to the precluded questions might have played in the defense in order to analyze the nature of the foreclosed inquiry. *See United States v. Cardillo, supra*. To discourage undue reliance on the necessity for such speculation in the future, however, we note the following language in *Alford v. United States*, 282 U.S. 687, 692, 51 S.Ct. 218, 219, 75 L.Ed. 624, 628 (1931): "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." (citations omitted.)

The precluded lines of inquiry involved subject matter either testified to on direct examination or potentially demonstrative of untruthfulness with respect to specific events of the crime charged. The defendant had a right to gain more complete disclosure about this subject matter on cross-examination. That he was prevented from so doing constitutes reversible error.

The defendant raises a number of additional issues, which we need not address, because we consider his confrontation challenge meritorious.

The judgments and sentences of the Superior Court are reversed and remanded.

STRUCKMEYER, C. J., HOLOHAN, V. C. J., and HAYS and CAMERON, JJ., concur.